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A CONCISE INTRODUCTION  
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OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW;  
*Assistant Reader of the Law of Real and Personal Property in the Inns of Court;  
Author of "A General View of the Law of Property"; and joint Author  
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1900.

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TO THE  
RT. HON. JAMES BRYCE, M.P.,  
SOMETIME REGIUS PROFESSOR OF CIVIL LAW OF THE  
UNIVERSITY OF OXFORD.

*Dear Mr. Bryce,*

*To you I beg to dedicate this little work in remembrance of the time when you, then also a reader of the Inns of Court and a conveyancer of Lincoln's Inn, introduced me, a youthful student of the law, to the learned Society of the Middle Temple. I wish to inscribe it to you also as an evidence of my profound respect for your learning, ability, and character.*

*I beg to remain, dear Mr. Bryce,*

*Yours very sincerely,*

J. ANDREW STRAHAN.

MAY, 1900.





## PREFACE.

THIS little work is rather an Introduction to Conveyances than an Introduction to Conveyancing. Its object is not so much to teach the student to draft, as to enable him to understand, assurances of land. No doubt to draft them intelligently one must understand the full import and operation of every phrase ordinarily used in such instruments, but to this extent every lawyer, whether a conveyancer or not, should have a knowledge of conveyancing. This has become the more necessary of late owing to recent legislation which has shortened forms of assurance by implying all sorts of covenants, conditions, and powers, no reference to which appears on the face of the deed. It is hoped on this account that the book may prove useful to every student of law, to whatever branch of practice he means ultimately to devote his chief attention.

The method followed is to take an example of each of the chief forms of assurance and examine it clause by clause. It should be noted that the examples are drawn not to serve as precedents, but in order to raise the points which most need explanation.

The Author has to thank Mr. BLYTH (of the firm of Paines, Blyth, and Huxtable) not merely for the chapter on Registration of Title, but also for kindly reading the proof sheets of the whole work. His large experience in practical conveyancing, and in the training of articulated clerks, has enabled him to give the Author many valuable hints, for which the latter desires to express his gratitude.

J. A. S.

1, NEW SQUARE,  
LINCOLN'S INN,  
May, 1900. ,

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WHEN it is desired to transfer a right of property from one person to another it is generally expedient, in order to prevent future doubts arising as to the precise nature of the transaction, and it is often necessary in law to effect the desired transfer, that the whole transaction should be set out in a written instrument. When the transaction is so set out the written instrument is called an assurance of the right in question. The knowledge of the law of property, and the skill in applying it, needful for the proper preparation of assurances, constitute the science and art of conveyancing.

The proprietary rights with which conveyancing is mainly concerned are proprietary rights over land.

**Sect. 1.** Proprietary rights over goods and other kinds of personalty also come, sometimes, within the province of conveyancing, more especially in connection with settlements and mortgages; but when they do, it is customary to use, in transferring them, the same forms of assurance which are necessary to transfer interests in land. In this respect conveyancing has gone in the opposite direction from the general law in regard to property, in which the tendency has long been to approximate the law of realty to the law of personalty. It is true that conveyancing has taken a long step in the same direction recently, under the Land Transfer Acts, 1875 and 1897, by which interests in land are, after registration, to be transferred much in the same way as stocks and shares are transferred now. These Acts, however, have little operation as yet, but if they ever become generally applied, conveyancing of the simpler kind will have to a great extent ceased to exist.

English law  
and history.

Confining ourselves, then, for the present to the transfer of proprietary rights over land, and to the transfer of them from one living person to another—transfer by will can be more conveniently treated of separately—it is necessary, in order to understand modern assurances, to go back practically to the beginning of English law. It is the same with every portion of the law of property in land. The legal land system of England, though it has often, especially of late, been deliberately altered and amended by the Legislature, is still in its essentials not the result of conscious legislation but of the whole history of the nation. Like the constitution of England, it has not been made; it has grown. That is why it is at once the most intricate, technical and characteristic part of English law.

Heredita-  
ments, cor-  
poreal and  
incorporeal.

Looking, then, to the law of property as it was in very early times, and confining ourselves, for the present, to land held in what is now called freehold tenure, but what was then practically the only tenure, we find that proprietary

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rights over land to be then recognised by the common law, had to be held in estates for life or in fee. When so held they were called *hereditaments*, though that word, properly speaking, applies only to estates in fee which are heritable interests, and not to estates for the life of the owner, which, of course, come to an end on the death of the owner, or to estates for another person's life — estates *pur autre vie* — which, though they may continue after their owner's death, are not in their nature heritable. Now estates for life and in fee might subsist over the land itself, and in that case they might be either immediate, *i.e.*, entitling the owner to the enjoyment of the land at once; or they might be future, *i.e.*, the enjoyment of the owner might be postponed till the determination or end of an interest, or of several interests preceding his estate; or they might subsist not over the land itself, but over some right or profit arising out of or relating to the land, such as a rent charged upon the land or the tithes issuing out of the land, or a right to common of pasture on the land, or to a title of honour or ancient office connected with the land. In the case of future estates in the land and estates of all kinds, not in the land but merely in rights or profits issuing out of or relating to the land, it is clear that there could be no right to the corporal possession of the land; while in the case of immediate estates in the land the corporal possession of the land was the most essential part of the estate, since without it the owner of the estate could obtain no benefit out of it. This distinction gave rise to a division of hereditaments. Immediate estates in the land itself were called *corporeal hereditaments*; future estates in the land itself, and both immediate and future estates in profits or rights issuing out of or relating to the land, were called *incorporeal hereditaments* (Co. Litt. 9 a).

In all early systems of jurisprudence possession is nine Livery of points of the law. That this was so in early English jurisprudence is shown by the strictness with which it was

**Sect. 1.** insisted that where the right to possession was incident to an estate in land the estate could be transferred only by transferring the possession. The possession which was incident to a corporeal hereditament was called the *seisin* of the land, and so corporeal hereditaments were transferable only by *livery* (or delivery) *of the seisin*. Possession not being incident to incorporeal hereditaments, these were transferable by an instrument in writing solemnly made between the parties. This instrument was at first called a charter, and is now called a *deed* (*factum*) *of grant*. All this was epitomised in the maxim that corporeal hereditaments lie in livery, while incorporeal hereditaments lie in grant (Co. Litt. 9 a).

The history of conveyancing in England is, in brief, simply the record of the steps by which the written instrument, which was originally applicable only, and which was and is necessary (Co. Litt. 9 b), to the transfer of incorporeal hereditaments, in the end became, partly by the devices of lawyers and partly by the legislation of Parliament, the mode by which all interests in land, whether freehold or leasehold—save only short tenancies and customary interests—are now assured.

We will trace shortly these steps, showing the various modes adopted for transferring corporeal hereditaments, from the time when they could pass only by livery of seisin to the present, when practically all interests in land are assured by deed of grant. It is necessary to do this, not merely in order that a deed of grant as now drawn may be understood by the reader, but also because conveyances by every conceivable mode are constantly met with in perusing abstracts of title, and because every one of them may be made use of, even at the present day.

**Feoffments.** A transfer by livery of seisin was ordinarily called a *feoffment*. That term, like hereditaments, is an example

of the laxity of technical language in English law. "Feoffment" means, strictly speaking, the transfer of the fee, that is, of the inheritance (Litt. s. 57) in the land, but it was soon applied (improperly, as Lord COKE notes) to every transfer by livery, whether the estate transferred was a fee or merely a life estate (Co. Litt. 9 a). The ceremony, to an extent, resembled that observed in the old Roman conveyance by mancipation. The grantor—or *feoffor*—and the grantee—or *feoffee*—having come to the land to be transferred, the former handed over the vacant possession of it to the latter, delivering to him at the same time a twig of a tree or some other thing off the land, as a symbol of the land itself, and declaring in apt words the nature of the estate the grantee was to take; that is, whether it was the whole fee or inheritance, or merely a life estate, these being, as already said, the only interests recognised by the common law as estates or parts of the ownership in land. No person other than the grantor having any interest in the land transferred might be present, except a tenant for a mere chattel interest, whose presence as a consenting party did not invalidate the feoffment, since at common law he was regarded as having no estate in, but merely the occupation as agent of the freeholder or legal owner of the land of which he was tenant (see *infra*, p. 25). A feoffment of one parcel of land operated, if so intended, to convey to the feoffee any other parcels belonging to the feoffor situate in the same country (Litt. s. 61). Until the passing of the Statute of Frauds no writing was necessary to the validity of a feoffment, unless the grant was to a corporation aggregate, though it would seem that at all times if a condition of re-entry was reserved to the feoffor—that is, a condition upon breach of which the grantor might put an end to the estate granted—that had to be reserved by deed (Co. Litt. 225 a).

The essential matter in a feoffment was the actual passing of the possession of the land to the feoffee. Where

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the possession did not actually pass there might be what was called livery *in law*,—that is, going through the form of livery, not on, but in sight of the land to be conveyed; but such a feoffment did not, as a rule, operate until the feoffee obtained the actual possession by entry upon the land. And where the intended grantee had already the possession in fact, however small his interest,—even if he were merely tenant at will of the grantor,—no feoffment was necessary to convey the whole fee or any other freehold interest. All that was then necessary was a *release* of the grantor's rights to the grantee. Such a release was effected by means of a deed, and, as we shall see, releases were subsequently destined to take a large share in displacing feoffments as the ordinary mode of conveying freehold interests in possession.

## Uses of land.

Feoffment continued the ordinary legal mode of conveying corporeal hereditaments until the time of Henry VIII. Meanwhile, a new system of holding land was growing up which, with the unintended aid of certain legislation, was in time not merely to supersede feoffments, but to alter the whole principles of conveyancing. This system was that of holding land to uses, or, as we would now say, on trust. It might be created by a landowner conveying his land by feoffment to a second person, with directions to hold the land on certain uses, or by the landowner constituting himself by express declaration (see *infra*, p. 14), or by conduct (see *infra*, p. 14), a holder of his land on certain uses. In either case the holder of the land—usually called the *feoffee to uses*—was the common law owner of the land, and entitled at common law to exercise all the rights of the owner; but in Chancery he was regarded as a mere trustee of the ownership, for the benefit of the person or persons to whose use he held,—commonly called the *cestui*, or *cestui's que trust*,—and he was compelled to exercise his rights of ownership as the *cestui que trust* desired, and this right



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to call upon him to exercise these rights was regarded in Chancery as a kind of ownership itself—the *beneficial* or *equitable* ownership of the land, as we would now call it. This beneficial or equitable ownership was not recognised at all by the common law, but solely by the Court of Chancery, and it was not subject to the principles of the common law save so far as the Court of Chancery thought such principles were just and judicious, and, as we shall see, that was not very far. In particular, the Court of Chancery permitted the equitable ownership to be created and transferred not merely without the common law formalities of feoffment or deed, but without any formalities whatever—a dangerous facility, which the Legislature subsequently found it necessary to restrain (see *infra*, p. 33).

The Statute of Uses (27 Hen. 8, c. 10, A.D. 1535) was passed for the purpose of putting an end to the system of holding land to uses (see preamble). It attempted to do this not by forbidding the creation of uses in the future, but by enacting that “where any person or persons stand or be seised or at any time hereafter shall happen to be seised, of and in any . . . hereditaments, to the use confidence or trust of any other person or persons or of any body politic . . . in every such case all and every such person and persons and bodies politic that have or hereafter shall have any such use confidence or trust in fee simple fee tail for term of life or for years or otherwise, or any use . . . in remainder or reverter, shall from henceforth stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same . . . hereditaments with their appurtenances to all intents constructions and purposes in the law, of and in such like estates as they . . . shall have in use trust or confidence of or in the same. And that the estate right title and possession that was in such person or persons that were or shall be hereafter seised of any . . . hereditaments, to the use



**Sect. 1.** confidence or trust of any such person or persons or of any body politic be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use confidence or trust, after such quality manner form and condition as they had before in or to the use confidence or trust that was in them.”

These are the operative words of s. 1 of the Statute of Frauds, and since they have been for centuries and are still the basis of the whole system of conveying real estate, it is in the highest degree desirable that a student of conveyancing should intellectually assimilate them in their precise force and effect. In order to help him to do so I will discuss in some little detail the conditions which the words of the section require to be fulfilled before the statute can operate, and the effect of the operation of the statute.

Require-  
ments for  
operation  
of statute  
An indi-  
vidual.

In order that the statute may operate, the section requires,—

*a PERSON or PERSONS shall be seised.*

Generally speaking, the word “person” includes in law a corporation. It means an individual or a body of individuals which the law treats as an individual. But here “person or persons” is contrasted with “person or persons or any body politic” in other portions of the section, and this has been held to show that the word “person” is not meant to include a corporation.

Must be  
seised.

(2.) *That the person must be SEISED of a HEREDITAMENT.*

As has already been pointed out, no interests, save estates for life or in fee, are hereditaments. Accordingly, if the interest held by the person is a lease for years or any other chattel interest, the statute does not operate on it. And a person cannot be *seised* of any hereditament unless it is of freehold tenure. Accordingly, if the hereditament held by him is a personal hereditament—as, for

example, an annuity in fee—or if it be a heritable estate in customary or copyhold tenure, the statute does not operate on it. Sect. 1.

(3.) *That he must be seised TO THE USE of some other person.* To the use.

As far as the other person is concerned, he must be seised simply to his use. If he be seised for other uses besides, the statute will not operate. This does not mean that the whole estate vested in him must be for the use of the other person, but merely that, as far as the other person's interest in the land is concerned, the feoffee must be a bare feoffee to uses and not seised for some other purpose besides. Thus, if A. is seised in fee to the use that he shall manage the land and allow B. to receive the net rents and profits for life, and on B.'s death to the use of C. in fee, the statute will not operate as far as B.'s life interest is concerned, since A. in regard to it is seised to other uses—namely, the management of the property—besides the use to B.; but it will operate as far as C.'s interest is concerned, since in regard to his interest in the land, A. is seised solely to his, and no other use.

4.) *That he must be seised to the use of some OTHER* Of some other individual ;

Generally speaking, a person cannot be seised to his own use within the statute. As we shall see, the usual mode of limiting a freehold estate to A. is to grant it “unto and to the use of” A. Such a limitation operates at common law, and not by the statute, and the words “to the use of” have no effects, save these. Firstly, if A. have given no consideration for the grant, by declaring the grant to be for his use, they rebut the presumption that he was intended to hold for the benefit of the grantor (see *infra*, p. 81). Secondly, by setting out one use they make any other use limited after it, a use upon a use (see *infra*, p. 28); and

**Sect. 1.** so one on which the statute will not operate. Thus, on a limitation “unto and to the use of A. and his heirs to the use of B. and his heirs” the statute will not operate on the use to B. (see *infra*, p. 30).

Or corpora-  
tion.

(5.) *That he may be seised to the use of any other person or BODY POLITIC.*

Accordingly, although the statute will not operate where the feoffee to use is not an individual but a corporation, it will operate where the *cestui que use* is either an individual or a corporation.

For any  
interest.

(6.) *That he may be seised to the use of the other person or body politic either for a fee simple or fee tail, or for life, or for a TERM OF YEARS OR OTHERWISE.*

Accordingly, although the statute will not operate unless the estate of feoffee to uses is a hereditament of freehold tenure the use limited to the *cestui que use* may be either of a freehold hereditament or of a chattel, or of any other interest. Thus, if the limitation was of a term of 1,000 years to A. to the use of B. for one hundred years, the statute would not operate on the use to B.; but if the limitation were to A. for life in freehold land to the use of B. for one year, the statute would operate on the use to B.

When we come to consider chattel interests (see *in* p. 25), we shall find that while feoffment was never necessary for their creation, yet an actual taking possession of the land granted was, and in cases where the Statute of Uses does not apply, still is, necessary to perfect the title of the lessee. Where, however, the lease is made in such a manner that the statute will operate upon it—that is by bargain and sale (see *infra*, p. 26)—no entry into possession is necessary to create the chattel interest. By force of the statute the grantee is deemed at once to be

in possession of the land for the chattel interest granted to him,—and the chattel interest granted is complete. Sect. 1.

(7.) *That he may be seised to the use of the other person* In possession or in expectancy.  
in REVERSION or REMAINDER.

In other words, the statute will operate on the use whether it is limited to arise immediately, or only in the future. The words here used apply strictly only to uses limited to follow subsisting interest, but as the statute did not forbid the creation of uses in any mode by which they could be created before the passing of the statute, and as they could then be created not to follow subsisting uses, but without any subsisting use preceding them, or in defeasance of a subsisting use, the court, in applying the statute, read these words as covering any future use that could lawfully be created. Accordingly, the statute would operate on a limitation to A. and his heirs to the use of the first son of B. in fee simple, though B. had no son when the use was limited or a limitation to A. and his heirs to A.'s use until B. had a son born to him, and then to B.'s son in fee.

a limitation to uses fulfils the preceding conditions, the statute operates upon it, and the effect of such operation is that the person who but for it would be entitled merely to the beneficial or equitable ownership of the hereditament, becomes entitled at once to its legal ownership to the same extent as the use of the hereditament was given to him. In the words of the statute, he henceforth shall “stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same . . . hereditaments with their appurtenances to all intents constructions and purposes in the law, of and in such like estates as they had or shall have in use trust or confidence of or in the same,” and “the estate right title and possession that was in such person or persons that

Effect of operation of Statute of Uses.

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were . . . seised . . . to the use ” of him, is to be clearly deemed and adjudged to be in him after such quality, manner, form, or condition as he had before in the use. In other words, by force of the statute, and without any livery of seisin or conveyance of any kind, the legal title and the legal possession of the hereditament, in so far as the feoffee to uses had these are deemed to be in the *cestui que use* to the extent of the interest limited to him in the use.

Modes of  
raising uses.

As has already been pointed out, a landowner might create uses, not merely by conveying his land to feoffees to uses, but by constituting himself a holder of it to uses by express declaration or by conduct. The mode of constituting himself a holder to uses by express declaration (or settlor as he would now be called), was by what was known as a *covenant to stand seised*. That was, shortly, a declaration under seal of the settlor's intention henceforth to hold his land to the use of certain persons related to him by blood or marriage, for the interests therein set out. The mode of constituting himself a holder to uses by conduct, was by what was known as a *bargain and sale*. That was, shortly, a sale by the landowner of a certain interest in the land, with receipt by him of the purchase-money, without making any legal conveyance to the purchaser of the interest sold. In the first case, the landowner was compelled by the Court of Chancery to hold his land for the benefit of the relatives mentioned in the covenants, and in the second case, for the benefit of the purchaser to the extent of the interests conferred on or sold to each of them respectively.

Covenant to  
stand seised.

Bargain  
and sale.

Effect of  
the statute  
on these.

Now, after the passing of the Statute of Uses, a landowner might still raise uses by covenanting to stand seised of his land, or by bargaining and selling it and receiving the purchase-money without making conveyance ; but, if in either case, the land was land of freehold tenure, the statute operated on the transaction and the relative in the

one case, and the purchaser in the other, instead of taking a mere use or equitable interest in the land, took the legal estate for the interest covenanted to be granted or bargained and sold to him. This result in the case of covenants to stand seised, was not altogether undesirable. The terms of the transaction were set out in the instrument containing the covenant, so that there was no doubt about its nature. And the covenant had to be based on *good* consideration, as it was called—that is, it had, to make it effective, to be made in consideration of natural love and affection for a relative by blood or marriage—so such settlements could not have a very extended operation. Accordingly, covenants to stand seised were allowed by the Legislature to exist uncontrolled as a convenient mode of making provision for children, and at last only became obsolete through their being unfitted for the more modern form of settlement, which necessitated the limitation of interests to trustees to preserve contingent remainders. As such trustees were often not related by blood or marriage to the settlor, no interest could be limited to them by a covenant to stand seised.

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None of the considerations, however, which were held to render covenants to stand seised a useful mode of conveyance, applied to bargains and sales. The two prime objects of the Statute of Uses were, in the first place, to make the ownership of land a matter of public notoriety, and in the second place, to prevent fraud through feoffees to uses denying that they held on the uses on which they had agreed by word of mouth to hold. Both of these objects were frustrated by a bargain and sale, because by it the ownership of land could be transferred by a transaction which might be secret, and which need not be in writing. To prevent the Statute of Uses making easy of accomplishment the very evils it was intended to restrain, Parliament, in the same year that saw the passing of the Statute of Uses (1535 A.D.), passed another Act called the

Bargains and sales of freehold interests to be inrolled.



**Sect. 1.** Statute of Enrolments (27 Hen. 8, c. 16), intended to render void all bargains and sales of lands, except the same were made in writing, indented and sealed (see *infra*, p. 42), and inrolled in one of the King's Courts of Record at Westminster, or else before the *custos rotulorum* and clerk of the peace of the county, or the mayor or recorder of the borough within which the lands bargained and sold were situate.

Statute of  
Enrolments  
does not  
apply to  
bargains and  
sales of  
chattel  
interests

For a time this Act seemed effectually to block the way to secret conveyances of land, which the Statute of Uses was intended to close, but had only opened wider. Soon, however, it was observed that it referred only to bargains and sales of "estates of inheritance and freeholds." Now a landowner could raise a use of a chattel interest in his land by bargain and sale, just as well as he could raise the use of a freehold interest, and if he, having a freehold interest in his land, raised by bargain and sale the use of a chattel interest, the Statute of Uses would operate upon or execute the use in favour of the purchaser, and such a transaction would need no enrolment under the Statute of Enrolments. The effect of the operation of the Statute of Uses on the transaction was that the purchaser would be deemed in law to be in legal possession of the land for the chattel interest. But, as has already been pointed out (*supra*, p. 8), once a person is in possession of the land, however small his interest may be, any interest, however great, can now and could always be conveyed to him without feoffment, by a mere deed releasing it to him. It followed from this that if the owner of a corporeal hereditament in freehold lands wished to convey it to a purchaser without feoffment, he might do so by first bargaining and selling to the purchaser a lease of the lands for a year, and the Statute of Uses having operated upon that and put the purchaser into possession, then by releasing to him by deed the hereditament intended to be conveyed. In this way arose conveyance

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by *lease and release*, which soon became the ordinary mode of conveying freehold lands in possession — and indeed also of freehold lands in expectancy—and which prevailed throughout England for about three centuries. Feoffments ceased almost completely to be used save by corporations, which, as they could not be seised to a use under the Statute of Uses (see *supra*, p. 10), could not convey by lease and release, and save by infant tenants in gavelkind, who could convey by feoffment (see *infra*, p. 18), but could not convey by lease and release, since, as infants, they could not at common law execute a deed.

The mode in which a conveyance by lease and release was in practice carried out was thus : A lease was prepared in which it was stated that in consideration of the sum of five shillings paid before the sealing and delivery of the lease, by the lessee—*i.e.*, the person to whom the lease was granted—to the lessor—*i.e.*, the grantor of the lease—the lessor bargained and sold to the lessee the premises intended to be conveyed from the day next before the date of the lease for one whole year thence next ensuing to the intent that by virtue of the lease, and of the statute for transferring uses into possession (the Statute of Uses), the lessee might be in actual possession of the premises and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises. A release was also prepared in which the real consideration, the extent of the estate granted and the uses and conditions upon which it was granted were duly set forth. Both lease and release were executed upon the same day, the lease being executed first, but the lease was dated the day preceding the date of execution.

In conveyance by lease and release two instruments were needed to convey one hereditament. It was therefore unnecessarily cumbersome and expensive. The

Legislative alterations



**Sect. 1.** Legislature, after it had been in general use for several centuries, noticed this, and provided a remedy. It abolished the necessity for a lease (4 & 5 Vict. c. 21), enacting that after May 15th, 1841, a release if expressed to be made in pursuance of the Act should be as effectual as if a lease for a year had preceded it. The result was, that the owner of land could release his right to it to a person who had previously no interest in it. This child-like expedient continued in operation for four years, when the Act to amend the Law of Real Property was passed (8 & 9 Vict. c. 106). Section 2 of that statute enacts that after October 1st, 1845, “all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.” By this short provision the whole system of conveyance of corporeal hereditaments of freehold tenure by feoffment, by lease and release, and by release, was superseded, and the deed of grant which previously was applicable only to the transfer of incorporeal hereditaments became sufficient for the transfer of corporeal hereditaments. Leases and releases were relegated to their proper purposes—the former to create a chattel interest, the latter to transfer to a person who already has an interest in the land the rest of the grantor’s interest. Feoffments by corporations ceased also, and now feoffments occur in practice only when an infant conveys land held under the custom of Kent, or some other local custom.

Corporeal hereditaments to lie in grant as well as livery.

Deed now sufficient and necessary to convey freehold.

The Act for the Amendment of the Law of Property not only made a deed sufficient to pass corporeal hereditaments ; it made a deed necessary to the passing of almost any legal interest in land by almost any mode of conveyance. Section 3 enacts that “a feoffment made after the said first day of October one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed ; and a partition [see *infra*, p. 19] and an exchange

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[see *infra*, p. 20] of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing [see *infra*, p. 26], of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October one thousand eight hundred and forty-five, shall also be void at law, unless made by deed : Provided always, that the said enactment, so far as the same relates to a release or a surrender, shall not extend to Ireland."

Of the modes of conveyance mentioned in this section, one (release) has already been referred to : it consists in the giving up to a person already in possession of the land as of some estate however small, of the remainder of the relessor's interest. A release had always to be by deed. *A surrender* is the converse of a release : it consists in the person in possession of the land as of some estate giving up his interest to the person entitled to the land in succession to his interest. At one time a surrender might be by parol—that is, without feoffment deed, or even writing of any kind. By s. 3 of the Statute of Frauds (29 Car. 2, c. 3), a surrender had to be by deed or note in writing, and now it must be by deed. It is to be noted that a chattel as well as a freehold interest can be surrendered, and s. 3 of the Act for the Amendment of the Law of Property only requires the surrender of such an interest to be by deed, when it is one that might not have been created without writing (see *infra*, p. 26). The other two modes of conveyance mentioned in s. 3, and applicable to hereditaments, are partition and exchange. *Partition* consists in the division up of land held in concurrent ownership among the concurrent owners. The kinds of concurrent ownership for this purpose are joint

**Sect. 1.** tenancy, tenancy in common and co-parcenary. Formerly, partition might be made by parol, but now, as we have seen, when it takes place by conveyance between the parties, it must be by deed. The deed in the case of joint tenancy should be a release from each joint tenant to the other ; in tenancy in common an ordinary deed of grant. The reason of the distinction is that joint tenants are entitled each to the 'whole land, while tenants in common are entitled each to an undivided share of it. Co-parceners can partition either by grant or release. Partition, when the land to be partitioned is settled, is usually made by an award of the Board of Agriculture, when no conveyances at all are needed, but owing to the expense and delay and the necessity for equality in value of the different shares, this process is usually avoided when the land is not settled.

**Exchange.** *Exchange* is the barter of land for land. When the lands exchanged lay in the same county no deed or feoffment was needed. *Leases* we will consider after dealing with the other kinds of assurance of freehold interests.

**Different kinds of fees.**

As has already been said, the only interests in land originally recognised by the law were estates for life and in fee. Estates in fee were of different kinds. There were estates in fee simple which were estates descendible to the heirs general of the grantee, and subject to no condition. There were estates in fee determinable which were estates descendible to the heirs general of the grantee, but subject to a condition which might determine them while there were still heirs of the grantee existing, as, for example, an estate limited to A. and his heirs, tenants of the manor of Dale. Here, where A.'s heirs ceased to be tenants of the manor of Dale, the estate granted determined. Again, there were estates in fee conditional, which were estates descendible only to a special class of heirs of the grantee, such as heirs of his body or heirs male of his body. All fees, however, had one attribute in common : the grant of them took the

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whole estate which the grantor had in the land out of him. Whether the fee granted by an owner in fee simple was a fee simple, or a fee determinable, or a fee conditional, after granting it he ceased to have any estate—any share in the ownership—of the land. He had, indeed, what was called a *right of reverter*, that is, if the estate granted came to an end through the failure of the heirs of the grantee in the case of a fee simple, or through the occurrence of the determining event in the case of a determinable fee, or through the failure of the special heirs in a fee conditional, the ownership of the land reverted back to the grantor. But this right of reverter was not an estate in the land any more than the general right of reverter over all lands in the kingdom which belongs to the Crown as lord paramount is an estate. It was a mere incident of the tenure which then could subsist between the grantor of a fee simple as lord, and the grantee as tenant. Where this tenure subsisted the grantee held from the grantor, or was his *tenant*, just as now in theory every owner in fee simple who does not hold from a subject as mesne lord, holds from the Crown as lord paramount. And when, by the passing of the Statute of *Quia Emptores* (18 Edw. 1, c. 1), it was rendered impossible to create as between subjects the relation of lord and tenant between a grantor and a grantee in fee simple, no right of reverter existed on fee simple estates henceforth granted.

As to all this grantors and lawyers were agreed ; but as to a further point in regard to fees conditional they differed. The grantors reading such grants in their ordinary meaning, held that all that was granted to the grantee was an estate intended to last as long as the grantee had heirs of the kind mentioned in the grant, and no longer. The lawyers held that the reference in the grant to a special kind of heirs was only a condition imposed upon an ordinary grant in fee, and they held further that as soon as the grantee had an heir of the kind

**Sect. 1.** mentioned in the grant he had fulfilled the condition and was entitled, should he wish to do so, to convey the land granted in ordinary fee simple. The result of the lawyer's view was that the reverter to the lord was capable of being practically frustrated by the tenant in conditional fee alienating as soon as he had heritable issue. The estate he transferred on such an alienation was a fee simple, and though there was a reverter on that estate (until the statute of *Quia Emptores*), it was so liable to be defeated by alienation that it practically was worth nothing.

Statute  
*De Donis*  
*Conditionalibus*.

The chief grantors—that is, the great lords—being the predominant partners in the Legislature, enforced their view of what a conditional fee was by enacting the statute of *De Donis Conditionalibus* (13 Edw. 1, c. 1). This statute was intended merely to preserve to the grantors (or lords, as they were then called) the right of reverter on the failure of the special issue of a grantee in conditional fee, but it had quite another and altogether unforeseen effect. The courts held that it created a new estate hitherto unknown to the law—what they called an estate in *fee tail*—that is, *docked* or maimed fee—a fee which was not the whole ownership of the land but only a part of it, leaving in the grantor not a right of reverter merely but a reversion in fee simple, that is, an actual estate in fee simple to come into possession on the determination, in any way, of the fee tail. Not only so, but further, they held that the so-called fee tail was an estate which could not be alienated by its owner as against his issue. Should he try to alienate it, the reversion on the fee tail was in abeyance during his life, and so if the alienee committed waste neither the tenant who had alienated nor his issue could restrain him (Litt. s. 650), but on his death, leaving issue, his issue could oust his alienee, and if he died without issue his grantor or his heirs could do likewise by right of his reversion. All he could alienate was a *base*

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*fee*, that is, an estate descendible to the heirs of the grantee, but liable, if the grantor left issue, to be determined by his heirs; and if he did not leave issue, by his grantor's entry on the land.

This new estate of fee tail, then, was alienable by *Fees tail.* feoffment practically only, as a life estate. For two centuries or more this continued to be the case. Then the courts established another mode of alienation. They recognised as lawful alienation by fines and recoveries—the first a compromised collusive action against the tenant in fee tail, the latter a collusive action carried to judgment. It is useless for present purposes to enter into the abstruse and somewhat absurd learning affecting the operation of fines and recoveries. One or two points, however, must be noticed, as the modern law as to alienating fee tails is based on them. These points may shortly be summed up thus :

- (1) A fine could be levied by a tenant in tail in expectancy without the consent of the tenant for life in possession; a recovery could be suffered only by a tenant in tail in possession or by a tenant in tail in expectancy, with the consent of the tenant for life in possession. Operation of fines and recoveries.
- (2) A fine barred only the tenant in tail and his issue; a recovery barred the remainderman also.

Conveyance by action at law is not, from the point of *Fines and recoveries* view either of expedition or cheapness, an ideal mode of transfer, and after it had been in operation for a few centuries, it so occurred to the Legislature. Accordingly, in the year 1833 the Act for the Abolition of Fines and Recoveries was passed (3 & 4 Will. 4, c. 75), by which enactment an ordinary deed inrolled was substituted for proceedings by actions at law. But in simplifying the form of barring fees tail Parliament did not, to any



**Sect. 1.**            considerable extent, alter the substance of the law respecting them. It followed substantially the distinction between the operation of a fine and recovery by enacting that while a tenant in tail in possession can bar the entail of his own motion (s. 34), a tenant in tail in remainder can do so only with the consent of the “protector of the settlement” (ss. 40 and 42), who (if no person is expressly appointed protector of the settlement) is the owner of the freehold in possession in the land (ss. 22 and 32). As regards tenants in tail in remainder, an exception to this rule occurs in the case of a tenant in tail in remainder, who himself owns the reversion in fee simple on his own fee tail: he is entitled to bar the fee tail without the protector’s consent.

## SECTION II.

## ASSURANCES OF LEASEHOLDS.

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THE last mode of conveyance mentioned in s. 3 of the Act to Amend the Law of Property (*supra*, p. 18), is, <sup>for term.</sup> a lease. It is of infinitely greater importance than the others, since by its exercise what is regarded as a different species of property from hereditaments, is called into existence, namely, chattels real or leaseholds (*a*).

Originally, a lease or grant for a time certain or term— <sup>At first a</sup> whether of years, months or days—was not regarded as <sup>lease did not</sup> convey an

(*a*) Chattels real include, strictly speaking, more than leaseholds; since a tenancy at will, and a tenancy on sufferance, are chattels real or chattel interests in land as far as such precarious tenancies can be called interests. And, again, leaseholds are not all, strictly speaking, chattels real; a lease for life is a leasehold, strictly speaking, but it is not a chattel real. In practice, however, leaseholds and chattels real are used as meaning the same thing—tenancies for a time certain—and where any thing more or less is meant, it should be expressly indicated.

Lease—as when speaking of leases for lives—is also opposed to grant, *i.e.*, it is meant to cover a transaction which consists, not in transferring the ownership of the land, but in hiring the land out.

That, of course, is the notion underlying the whole distinction between freehold and chattel interests. The freeholder is the owner; the lessee only the bailiff or farmer of the land. Nevertheless, a freeholder nowadays is frequently merely a hirer, just as the lessee is, and in such cases he is called popularly a lessee, even though his interest be fee simple—a fee farm grant, *i.e.*, a grant in fee simple subject to a rent, is popularly called a lease for ever.



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 ———  
 interest in  
 the land.

any legal interest in the land. At common law, the only legal interests which were recognised as parts of the ownership of the land, were estates for life or in fee. A grant for a year or for a number of years, was regarded merely as a contract between the lessor and lessee, carrying no right to the possession of the land; and if after making it, the lessor refused to give the lessee possession, or having given it to him disturbed his possession, the only remedy open to the lessee was an action for damages against the lessor for breach of contract. And this view still survives, to this extent, that the grant of a lease by itself gives the lessee no interest in the land itself. It only gives him an interest in the term—*interesse termini*. Entry upon the land in pursuance of the lease is necessary to give him an interest in the land. When he enters, however, his title relates back to the date of the grant.

Leases by  
 bargain  
 and sale.

As has been pointed out, the case is otherwise when the lease is made by bargain and sale. Then the Statute of Uses comes into operation, and the lease confers at once a legal title to the land for the term of the lease, from the moment it is granted.

Leasehold  
 now inde-  
 feasible.

It is not necessary to trace here the various statutes by which, at last, in the reign of Henry VIII. (21 Hen. c. 15), leaseholds were made indefeasible. The important point at present is that, at that time, and for many years afterwards, they could be both created and assigned by mere parol. This was first altered by the Statute of Frauds (29 Car. 2, c. 3), s. 1 of which enacted that no lease should have any effect, save as a tenancy at will, if it were “not put in writing and signed by the parties so making or creating the same.” Section 2 introduced an exception to s. 1 in favour of “leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord during such term shall

amount unto two third parts at the least of the full improved value of the thing demised.” Sect. 2.

It was in relation to the state of the law as fixed by this Act, that s. 3 of the Act to amend the Law of Property was passed. The effect, therefore, of it, is that every assignment of a lease, whatever the term of the lease may be, must be by deed, and that every lease for three years or more from the making thereof, whatever the rent reserved in it may be, must be made by deed. As to leases for terms not exceeding three years, they must be by deed, too, unless the rent reserved to the landlord during the term is at least two-thirds of the full improved value of the land—two-thirds of its “rack-rent,” as it is called (*b*). If the rent reserved is at least two-thirds of a rack-rent, they may be made by parol, and may also be surrendered by parol.

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(*b*) The student should, perhaps, be reminded that though a lease for more than three years under hand, but not under seal, is bad as a lease, it may be good as an agreement for a lease and as such enforceable by the intended lessee specifically (*Parker v. Taswell*, 27 L. J. Ch. 812).

## SECTION III.

## ASSURANCES OF EQUITABLE INTERESTS.

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Equitable  
interests.

WE have now seen how a deed has been made necessary and sufficient for the transfer of practically every legal interest in land, whether such interest is freehold or leasehold. But as yet we have been considering merely legal interests and assurances which derive their efficiency from the common law or from statute. We must now consider shortly equitable and copyhold interests in land and one or two modes of assurance never recognised by the common law, nor, expressly at any rate, by statute.

Legal and  
beneficial  
ownership.

The object of the Legislature in enacting the Statute of Uses was, as has already been said, to put an end to the separation which had grown up between the legal and the beneficial ownership of land. The most striking fact, however, about early statutes relating to land is that by no chance did they ever accomplish the object which the Legislature had in view in enacting them, while they constantly accomplished all manner of surprising things, which it never entered into the mind of the Legislature to bring about. This is especially true of the Statute of Uses. As we shall see, it caused a revolution in conveyancing with which the Legislature was satisfied ; but it did not put a stop to the separation of the legal and beneficial ownership of land which the Legislature was wishful to destroy. This resulted from the doctrine established by the

Doctrine of a  
use upon a  
use.

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decisions of the Courts of Common Law that the statute could only operate upon a use of hereditaments, and that if a second use were limited over upon the first use, the second use was not a use of hereditaments, but was a use of or upon a use. Thus, if hereditaments were limited to A. and his heirs to the use of B. and his heirs, and B. was further directed to hold to the use of C. and his heirs, the courts held that the statute operated on A.'s legal estate, which it conveyed to B., but it could not operate to convey B.'s legal estate to C., since C.'s use was not a use of hereditament, but a use of a use. Accordingly, as far as C.'s use was concerned, the common law would have allowed it to fail. The Chancellor, however, held that on such a limitation it would be inequitable to permit B. to keep the benefit which the settlor plainly intended C. to take, and accordingly he insisted that B. should hold the hereditaments for the benefit of C. Uses accordingly were thereupon re-established, but henceforth to distinguish uses on which the statute operated from uses upon which it did not operate, and which therefore created not legal but merely equitable or beneficial estates, the latter were called *trusts*.

But there is no magic in the words "use" and "trust"; Trusts. both are in the text of the Statute of Uses (see *supra*), and whether the estate created by either of them is legal or merely equitable will depend, not upon which of them is used, but upon the form of the limitation. If the grant on which the use or trust is declared be such as to convey the legal estate to the grantee independently of the Statute of Uses—or, as the technical phrase is, transmute the possession—then unless the use be expressly declared to be in the grantee every use or trust declared in favour of another person than the grantee will carry the legal as well as the equitable estate. Thus, if the limitation be by ordinary deed of grant operating under the Act to amend the Law of Property (see *supra*, p. 18), and be to A. and

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his heirs to the use of B. and his heirs, the use to B. and his heirs will carry the legal estate. If, however, the grant be unto and to the use of A. and his heirs to the use of B. and his heirs, the legal estate will remain in A., not because the grant to him operated under the Statute of Uses, but because a use is expressly declared in A.'s favour, and therefore the use over to B. is a use upon a use (*Doe v. Passingham*, 6 B. & C. 305). Again, if the limitation be by way of lease and release, then if no use be declared on the release in favour of the grantee all uses declared in favour of third persons will carry the legal estate, because here it is only the lease which operates under the Statute of Uses; the release by which the freehold is conveyed operates at common law. On the other hand, as the freehold is conveyed by bargain and sale inrolled (see *supra*, p. 15), or by covenant to stand seised (see *supra*, p. 14), any uses declared upon the estate created by either of these conveyances in favour of third persons will not carry the legal estate, since in these the conveyance of the legal estate in the freehold to the purchaser or relative is by virtue of the Statute of Uses, and consequently any further use must be a use upon a use.

Operation  
of Statute  
of Uses.

Thus, by the simple expedient of adding three words to the previous form of limitation to uses—that is, instead of saying “unto A. and his heirs to the use of B. and his heirs,” by saying “unto and *to the use* of A. and his heirs to the use of B. and his heirs”—the whole operation of the Statute of Uses could be, and thenceforth where that was desired was and still is absolutely defeated. In the words of Lord HARDWICKE, “A statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction has had no other effect than to add at most three words to a conveyance” (1 Atk., 591). But the statute without this strict construction had a very limited application. It applied in the first place only where the interest of the feoffee to use was a freehold

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interest (*supra*, p. 10), and in the second place where the use declared was a passive use (*supra*, p. 11). Accordingly, uses of leaseholds were never interfered with by it, nor were uses of freeholds where the feoffee to uses had any active duties to perform. These uses, like uses of pure personalty, were unaffected by the Statute, and the trusts of the present day have, so far as they are concerned, a clear descent, without even a bar sinister like that in the pedigree of passive uses of freehold lands from the old system of uses established by the early chancellors.

Another mode in which trusts of land on which the Statute of Uses will not operate may arise, is this : Before the passing of the Statute of Uses the only modes in which a landowner could raise uses of his land without first transferring the legal estate to a feoffee to uses were by bargain and sale (*supra*, p. 14), and by covenant to stand seised (*supra*, p. 14). In other words, where the land was not actually transferred to a feoffee to uses, no declaration of its owner would raise a use, unless it was based on consideration, either valuable or good. But since the Statute of Uses the Court of Chancery has recognised declarations of trust of lands not based on value, and not accompanied by the transfer of the land, as under certain circumstances enforceable against the landowner. These, of course, not being uses recognised by the Court of Chancery at the time the Statute of Uses was passed, are not within, and the interests they create, therefore, in the persons in whose favour they are declared are merely equitable interests. The legal title to the land remains in the former owner—or settlor, as he is usually called—and the interests the *cestuis que* trust take are merely beneficial.

In connection with trusts two questions of some importance as regards modes of assurance arise. The first is, How can a trust of lands be declared? The

**Sect. 3.** second is, How can the equitable estate created by a trust of lands be alienated ?

**Declarations of trust.** Trusts of lands, like uses, were originally averrable ; that is they could be declared by word of mouth, and altogether without writing. And their owner might so declare the trusts, either on transferring the lands to a trustee or without transferring them by making himself a trustee. There was, however, this difference according as he did or did not transfer the lands, that if the lands were transferred, the parol declaration of trust was good only so far as it was in accordance with the instrument transferring the lands. If, for instance, the instrument declared that the lands were to be held in trust for B. a parol declaration of a trust of them in favour of C. would be bad. And even if the trust verbally declared was contrary to the legal inferences from the nature of the transaction, it was bad. Thus, if the so-called trustee gave valuable consideration for the lands, and the settlor declared a trust in favour of someone else, this declaration would in the absence of fraud on his part not bind the so-called trustee.

**Statute of Frauds.**

That was the law as to declarations of trusts of lands—and it still is the law as to declarations of trusts of goods—until the passing of the Statute of Frauds (29 Car. 2, c. 3), by s. 3 of which it was enacted that all declarations of trusts of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or else they shall be utterly void and of none effect.

Two points are to be noted about this enactment. In the first place, the word trusts in it includes uses (*Bushell v. Burland*, Holt. Rep, 733). Accordingly, when freeholds are vested in a feoffee to such uses as A. shall appoint, A.'s appointment, to be valid, must be evidenced by



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writing. In the second place, it does not say the declaration must be made in writing, but must be evidenced in writing. Accordingly, if A. declares by parol a trust of certain lands, and years afterwards reduces that declaration into writing, or writes letters from which the declaration can be proved, that will be sufficient to satisfy the section (*Rochevoucauld v. Bowstead*, 1897, 1 Ch. 196). Lastly, the word lands includes leasehold and copyholds as well as freeholds (*Foster v. Hale*, 3 Ves. 696; *Withers v. Withers*, Ambl. 151). Accordingly, declarations of trusts of these must be in writing.

As to the transfer of an equitable estate, originally it, too, could be effected by parol agreement. The law again was altered by the Statute of Frauds, s. 9 of which enacts that all grants and assignments of any trust shall likewise be in writing, signed by the party granting or assigning the same, or else shall likewise be utterly void or of none effect. Transfer of equitable interests.

Accordingly, a writing signed by the grantor or assignor is now necessary to the valid grant or assignment of an equitable interest in land. And, in general, it is also sufficient. A deed is not necessary to transfer an equitable, as it is to transfer a legal interest, with one exception: An equitable fee tail is barred in just the same manner as a legal fee tail, by deed inrolled (Act for the Abolition of Fines and Recoveries, 3 & 4 Will. 4, c. 74, s. 47). Deed not necessary.

But while a deed is not necessary to the grant or assignment of an equitable estate in land, in practice it is almost invariably used, and, indeed, as a rule, an equitable estate is transferred in precisely the same mode as it would be if it were a legal estate of the same kind. This, indeed, is the only safe rule, since, not infrequently, it is far from But always used in practice.



**Sect. 3.**        clear whether an interest which it is desired to convey is legal or equitable. At the same time, as we shall see, in spite of the provisions of ss. 7 and 9 of the Statute of Frauds, equitable estates in land may still be granted without either deed or writing both as between vendor and purchaser, and as between mortgagor and mortgagee.

## SECTION IV.

## ASSURANCES OF COPYHOLDS.

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| <i>Nature of tenure</i> . . .            | 35   | <i>copyhold</i> . . .             | 37   |
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WE have now dealt as far as is desirable for present Copyhold  
tenure. purposes, with the various modes of assuring all interests in land, whether legal or equitable, save only copyholds, and we have seen that a deed of grant is now sufficient to assure any of such interests, and is necessary at law to assure most of them. We now come to assurances of copyholds in connection with which deeds are, for very good reasons, commonly used, but which cannot be effected by deeds merely. But, first, it may be well to say a word or two as to the nature of copyhold tenure, or, as it is more accurately called, tenure by copy of court roll.

Copyhold tenure was unknown to the common law, Nature of  
tenure. under which a tenant was either a freeman, and as such could hold nothing but a freehold estate, or a serf, and as such could only hold at the will of his lord. But, in many manors, it became customary with the lords to permit their serfs to hold their lands for life, and even to allow their children to succeed them in their holdings, and as this custom became ancient, and as the serfs became free, the courts began to regard the lord as bound by it. When this happened, copyhold had become a new form of tenure, and was held to be established lawfully in every manor where "there is a custome which hath beene used time out of minde of man that certaine tenants within the same mannor have used to have lands and tenements to hold to

**Sect. 4.** — them and their heires in fee simple, fee taile or for terme of life, etc., at the will of the lord according to the custome of the same mannor ” (Litt. s. 73). And though a copyholder still holds “at the will of the lord according to the custome of the mannor,” yet where he holds “in fee simple fee taile or for terme of life,” the “custome of the mannor ” has made his estate as secure as that of a freeholder.

Title by copy  
of court roll.

For present purposes, the important point as to copyhold tenure, is that the only title that a copyholder can have to his estate, is the fact that he is entered on the court rolls of the manor as the owner of it, and until he is so entered he can have at law—though, as we shall see, he may have in equity—no estate. Accordingly, when the lord of a manor wishes to grant anew a copyhold interest, no estate passes until the grant is inrolled, and if the tenant of a subsisting copyhold interest wishes to alien it, he must surrender it to the lord who admits by entering the transfer on the rolls, the person to whom it is transferred. In both cases, the sole evidence of title as between him and the lord of the manor, which the grantee or purchaser obtains, is a copy of the entry on the court roll, and it is for this reason he is called a copyholder or tenant by copy of court roll (Litt. s. 75).

Surrender  
and admittance.

As is said, a subsisting copyhold estate must be transferred by surrender and admittance. The grantor surrenders his estate to the lord or steward of the manor to the use of the grantee for the estate granted. This may be made either in court or out of court. If made in court it may be made without writing, but if out of court, a memorandum of the surrender is made and signed by the parties and the steward. The lord or steward must enter such surrender in the court rolls (Copyhold Act, 1894, 57 & 58 Vict. c. 46, s. 85). The grantee is then entitled

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to be admitted. Formerly he could be admitted only at the court of the manor, and only on presentation of the *homage*, *i.e.*, of the other copyholders of the manor who formed the customary court (*a*), and of whom to form a court there had to be present at least two (Co. Litt. 58 a). And moreover, the court itself had to be held within the manor save in cases where by custom a court for several adjoining manors was held within one of them (*ibid.*). Now, however, admittance may be made by the lord or steward, or deputy steward, out of the manor, and without holding a court, and without presentation by the homage of the surrender (s. 84, Copyhold Act, 1894). To prevent misunderstanding it may be added that the Statute of Uses does not apply to copyholds (*supra*, p. 9), and therefore the surrender to the use of the grantee confers on him neither the legal possession of, nor the legal estate in the copyhold. His title, as has been said before, only arises upon his admittance by the lord or his representative, but once he is admitted his title reverts back to the date of the surrender. The grantee need not attend personally to be admitted: his attorney appointed orally or in writing can take admittance for him (s. 84 (2) Copyhold Act, 1894).

Estates in fee tail in copyholds are like other copyhold estates, alienated by surrender to the use of the purchaser or the surrenderor (according as it is desired to sell the land, or bar the entail) in fee simple. If the consent of the protector is necessary, it may be given either by deed, which must be produced before or at the surrender to the lord or his steward (3 & 4 Will. 4, c. 74, s. 51), or

Assurances  
of fees tail  
in copyhold.

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(a) There were, sometimes, two courts in the same manor, one of copyholders, called the customary court, one of freeholders of the manor, called the court baron. Sometimes these courts sat together, in which case their rolls contained the record of matters transacted by both (Co. Litt. 58 a).

**Sect. 4.** in person in the court, or by memorandum out of the court, and in the former case a note of the protector's statement of consent, and in the latter his memorandum will be entered on the court rolls (s. 52).

Leases by  
copyholder.

Generally speaking, a copyholder cannot be granted a lease for a longer period than one year without the licence of the lord, and an attempt to grant one for a longer time without such licence causes a forfeiture of the copyholder's estate to the lord of the manor. In some manors, however, there is a special custom permitting copyholders to grant leases for longer periods, and in such cases the leases are similar in all ways to ordinary leases by a freeholder (see *infra*, p. 92).

So far we have been speaking merely of the conveyance of legal estates in possession of copyhold tenure. They, we see, can be conveyed without a deed or any instrument in writing, save the entries of the surrender and admittance and the copy of the latter given by the lord to the grantee. Where we come, however, to legal estates in expectancy, and equitable estates in possession or in expectancy, we find that the modes of conveyance applicable to similar estates in freeholds apply equally to them. Thus, equitable estates in copyhold are within ss. 7 and 9 of the Statute of Frauds (*supra*, p. 32), and their creation or assignment must be evidenced by writing (*Withers v. Withers*, Ambl. 151), and in practice they (like equitable freeholds) are always conveyed by deed. Again, an equitable fee tail in copyholds may be barred by deed inrolled within six months (*Honeywood v. Forster*, 31 Beav. 1) in the same way as an equitable fee tail in freeholds, except that the inrolment should be in the court of the manor (3 & 4 Will. 4, c. 74, s. 53). It may, however, also be barred by surrender in the same manner as if his estate were legal (s. 50). And legal estates in expectancy in copy-

holds are, and always were, assignable like similar estates in freeholds. When, however, they fall into possession, the grantee must be admitted. Lastly, by s. 20 (3) of the Settled Land Act, 1882, the equitable tenant for life of settled copyholds can, by deed, convey the legal estate in them, but such deed must be entered in the court rolls as if it were a surrender and admittance.

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SECTION V.

ASSURANCES BY DEED.

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Antiquity  
of deeds.

DEEDS (or charters, as they were at one time called), which, as we have now seen, are generally necessary and even more generally used for the assurance *inter vivos* of interests in land, are the most ancient instruments used to record transactions between parties known to English law. Lord COKE has traced their existence up to a very early age (Co. Litt. 7 a) (a), but their antiquity appears at least as strongly from the principles which affect them as it does from his learned researches. For these principles are in many respects the antithesis of those which modern law and law-givers are most inclined to observe and enforce.

(a) It is probable Lord COKE overstates the antiquity of instruments under seal in English law. The practice of sealing as a mode of authenticating documents was most likely introduced into England by the Normans, the corresponding practice among the Saxons being the marking the sign of the cross at the bottom of the instrument—a practice followed by the illiterate to this day. It is, perhaps, worth noticing that Richard I. was the first king of England who sealed with his coat of arms. He brought the practice of doing so from the Crusades. Blackstone says (2 Bla. Com. 305) that coats of arms were invented during the Crusades. “To distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained,” knights devised coats of arms and had them painted on their shields.

They are a survival from an age when there were other manners, other customs, and other modes of thought than those which prevail to-day.

At the present day the circumstances on which both courts and legislators incline to rely as making a written instrument one such as the law should enforce between the parties to it are chiefly these: In the first place, the parties to it must have executed it for valuable consideration. That doctrine lies at the base of the whole modern law of contract. In the second place, the party against whom it is to be enforced must have authenticated it by his signature. That rule was introduced into the law of contract by the Statute of Frauds, and has been insisted upon ever since. And the Legislature has again and again, where it thought particular evidence of authenticity was desirable, insisted that the signature of the parties should be attested by one or two witnesses. Conspicuous examples of this are to be seen in the rules laid down in the Wills Act (1 Vict. c. 28), as to the execution of wills, and in Lord St. Leonards' Act, 1859 (22 and 23 Vict., c. 35), as to the execution of powers (s. 12). Now at common law not one of these circumstances had or has any bearing whatever on the validity of a deed (*b*).

Validity of instruments generally.

The validity of a deed does not in the least depend upon whether or not its maker has received value for making it, or upon whether or not he has signed it, or upon whether or not it has been attested. Its validity depends entirely upon whether or not he has sealed and delivered it. Fraud apart, if he has done so, the question

Principles

(*b*) It may be noted as curious that Blackstone says that deeds must not merely be sealed and delivered, but must be based on value and signed and attested (2 Bla. Com. 296). Evidently he was confusing the practice with the law, and the necessity of value to raise a use with the validity of a deed.



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of valuable consideration does not arise. The saying is that a deed imports consideration (Plowd. 308). The real truth is that a deed was an instrument binding in law centuries before the doctrine of valuable consideration had been heard of. In the same way, his signature is not necessary, for the simple reason that when deeds first became legally recognised instruments not one in a thousand of those who executed them could write. That witnesses are not required is probably due to the fact that at first deeds were chiefly used to record acts publicly done, as in the case of feoffments. It is characteristic of the way that the actual law, as opposed to the theoretical law, adapts itself to social changes, that while in theory deeds need be neither signed nor attested, as a matter of fact, in practice, they always are both signed and attested, and if an unsigned or unattested deed were produced, it would be regarded by every lawyer with the gravest suspicion.

**Sealing.**

The two indispensable requisites to a deed, then, are sealing and delivery. And first, as to sealing. Put shortly, in order to seal a deed it is not necessary to affix a seal to it. It is sufficient to do some act which shows an intention to seal it. To touch the paper with a seal or even with the end of a rule or other instrument, with the intent to seal it, is sufficient, even though no impression whatever remains (Sugden on Powers, 8th ed., 232). And where there is no mark of a seal, if the deed be attested as sealed by the maker in the presence of the witnesses, that will be *primâ facie* evidence that it was properly sealed (*In re Sandilands*, L. R. 6 C. P. 411), which evidence, however, may very easily be rebutted (*National Provincial Bank of England v. Jackson*, 33 Ch. D. 1). In practice where paper is used the seals are generally simple red wafers put on by the law stationer; but where parchment is employed the parties seal with wax, and sometimes (as in the case of

marriage settlements) they seal with their own seals. In such cases it is usual to seal on the green tape used to tie together the different skins of parchment. Sect. 5.

Next, as to delivery. Put shortly, in order to deliver a deed it is not necessary to deliver it to anybody. It is sufficient to do some act or say some words which indicate that the instrument is intended to operate from that moment (see *Furness v. Meek*, 27 L. J. Exch. 34). As Lord COKE says, "A deed may be delivered by words, without actual touch, or by touch without words" (Co. Litt. 36 a). Thus, delivery may be made by handing the deed to the person who is to take under it without saying anything, or by saying it is delivered without parting with the possession of it. The whole question is one of fact: Did or did not the maker of the deed do or say something which showed that he intended that the instrument should operate at once (*per* BAYLEY, J., in *Doe v. Knight*, 5 B. & C. 671). If he did or said something to this effect, whether it consisted in throwing the instrument towards the other party, or in telling him to take it, or in declaring it "published," or in handing it to the grantees' or his own solicitor, that is a sufficient delivery, provided it was so intended (*Smith v. Adkins*, L. R. 14 Eq. 402). The proper mode of delivering a deed is by the maker placing his finger on the seal and saying, "I deliver this as my act and deed"; but this mode is not always followed, and, when it is not, the question whether or not what was done amounted to a delivery in law is one of fact, in deciding which the court will look to all the surrounding circumstances, to see if a delivery in law was intended (*Watkins v. Nash*, L. R. 20 Eq. 262).

Sometimes the instrument is delivered subject to a condition to be fulfilled before it operates. It is then called an *escrow*. The commonest example of an escrow

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is where a vendor or mortgagor executes a conveyance or mortgage and delivers it to his own solicitor, to be held by him until the purchase or mortgage money is paid. Such a conditional delivery has no effect until the condition is performed, but once the condition is performed the instrument operates as a deed, not from the performance of the condition, but from the delivery of the escrow, even though at the date of the performance of the condition the maker of the deed was dead (*Graham v. Graham*, 1 Ves., jun. 272). Formerly it was thought that in order that the instrument might be merely an escrow, the delivery must be to a third person and not to the grantee himself. "If a man," says Lord COKE, "deliver a writing sealed to the partie to whom it is made as an escrow to be his deed upon certain conditions, etc., this is an absolute deliverie of the deed, being made to the partie himself,—and then when the words are contrarie to the act, which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur* . . . But it may be delivered to a stranger as an escrow, etc., because the bare act of deliverie to him, without words, worketh nothing." (And see Shep. Touch., 7th ed., pp. 58, 59, and *Whyddon's Case*, Cro. Eliz. 520.) But this has never been actually decided to be the law (see *Hawksland v. Gatchel*, Cro. Eliz. 835), and of late it has been treated by the courts with scant respect. Thus in *Lloyd's Bank Limited v. Bullock*, [1896] 2 Ch. 192, it was held that delivery to a person who was solicitor both to the grantor and grantee was not enough to prevent the instrument from being held to be an escrow, and though in *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608, the Court of Appeal held that the surrounding circumstances showed that the instrument was delivered as a perfect deed, it declared expressly that it was of opinion that a delivery to the solicitor of both the grantor and the grantees, who was, besides himself,

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one of the grantees, was not enough to prevent evidence being admitted to show that the intention was to deliver the instrument, not as a deed, but as an escrow. The law seems to be that in every case the nature of the delivery is simply a question of fact (*Murray v. Earl of Stair*, 2 B. & C. 82), though, of course, if the instrument is delivered to the grantee himself, or to his solicitor as representing him, it will take strong evidence to rebut the natural inference from such an act that the delivery was intended to be a delivery in law.

Once a deed is sealed and delivered it becomes binding according to its terms, upon the parties to it, and it is binding upon them not merely as to the matter intended to be accomplished by it, but also as to the statements contained in it. As it is said, the parties are *estopped* (or prevented) from denying that the statements which they make under the solemn sanction of their deed are true. Estoppels, as Lord COKE says (Co. Litt. 352 a), may be “an excellent and curious kinde of learning,” but of late the courts have been inclined to regard the doctrine on which they are based as more curious than excellent, and as a doctrine “by which falsehood is made to have the effect of truth” (*per* JESSEL, M.R., in *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society*, 10 Ch. D. 15, at p. 25). Accordingly, the application of the doctrine has been confined to very meagre limits. To make a statement an estoppel from asserting anything to the contrary the statement must be—as was always the case—express, precise, and direct (*Low v. Bouverie*, [1891] 3 Ch. 82); it must not be by way of implication, either from other statements or from what the instrument purports to do (see Co. Litt. 352 b). Accordingly, a covenant is never such a statement as will prevent the covenantor from denying the state of facts it guarantees, since all that a covenant amounts to is not a

Estoppel  
by deed.

**Sect. 5.** statement that that state of facts exists but that if it does not exist the covenantor would be liable (*per* JESSEL, M.R., *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society*, *supra*, at p. 24). In the same way the grant of an estate is not a statement that the grantor has the estate he purports to grant (*Heath v. Crealock*, L. R. 10 Ch. 30). And again, a recital that the grantor is “seised or otherwise well and sufficiently entitled” to the land in question does not amount to a statement that he has the legal estate in the land, since such words would be satisfied by his having the equitable estate in it (*idem*), nor where a life tenant joins with the remainderman in conveying all the estate, right, title, claim, etc., in the land does that amount to a statement that he conveys a mortgage on the fee to which he is absolutely entitled, and which is not specifically referred to in the deed (*Williams v. Pinckney*, 77 L. T. 700). In the second place, even a precise statement in a deed estops only the person who makes it and those claiming through him. In a deed to which there are several parties if the statement is made on behalf of one only he alone is estopped by it (*per* PATTESON, J., in *Stronghill v. Buck*, 14 Q. B. 781, at p. 787). In the third place if the grantor is a volunteer (that is, if he has given no consideration for the grant) equity will not permit him to plead that the grantor is estopped from contending that statements made by him in the deed of grant were in fact erroneous (*Lovett v. Lovett*, [1898] 1 Ch. 82). And the same would be the case if the statement was induced by the fraud of the grantee (*Onward Building Society v. Smithson*, [1893] 1 Ch. 1). In the fourth place, if the statement in the deed is true, but not the whole truth, the person making it is not estopped from proving the whole truth (*Lovett v. Lovett*, *supra*). Lastly, the estoppel must be reciprocal, that is, it must be binding not merely on the person making the statement but on the person setting it up (Co. Litt. 352 b).

Deeds are called *deeds poll* or *indentures* according as there is one party only or are two or more parties to them. Deeds poll are so called because they were at one time polled or cut level at the top. They are now used chiefly for the purpose of granting powers of attorney and for exercising powers of appointment. Occasionally also, they are used by the Legislature when, for the bewilderment of lawyers, it enacts statutory forms to simplify conveyance. (See, for example, Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 4.)

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Deeds poll.

Indentures are so called because at one time they were indented or cut with an uneven edge at the top. This practice arose from the ancient mode of engrossing deeds to which there were two or more parties (c). In old times, when deeds were more concise (see *infra*, p. 49), and less complicated than they usually are at present, it was the fashion to make as many copies—or parts, as they were called—of the instrument as there were parties to it, which parts, taken together, formed the deed, and to engross all these on the same skin of parchment. Then a word—usually *cyrographum*—was written between the two or more copies, and the parchment was cut in a jagged line through this word. The notion in doing this was that the difficulty of so cutting another piece of parchment that it would fit exactly into this cutting and writing, constituted a safeguard against the fraudulent substitution of a different writing for one of the parts of the original. Then the different copies or parts of the deed were interchangeably executed by the several parties to the deed, the part

Indentures.

(c) For a sketch of the history of indenting, see Butler's Note, Co. Litt., p. 229 a. The practice seems to have come into fashion among lawyers about the time of King John. The intermediate writing which was cut through seems to have been abandoned about the time of Edward III. Previous to the rise of indenting the custom was to cut in straight lines with not merely a word but a sentence of intermediate writing.



**Sect. 5.** executed by the grantor being usually called the *original*, and the parts executed by the other parties the *counterparts*, or if all the parties executed all the parts they were all called originals (2 Bla. Com. 295).

Indenting  
not now  
necessary.

The practice of indenting deeds to which there were several parties continued long after it had been the custom to engross the several parts on the same skin of parchment, and even to this day it is usual to cut the top of the first sheet of such deed with an undulating edge. But the necessity of doing so—in so far as there was in law such necessity (*d*)—has been abolished by s. 5 of the Act to Amend the Law of Real Property (8 & 9 Vict. c. 106), which enacts that a deed executed after October 1st, 1845, purporting to be an indenture shall have the effect of an indenture though not actually indented.

Form of  
a deed.

Deeds are usually drawn in the third person. Sometimes, however, deeds poll, such as instruments granting powers of attorney, or exercising powers of appointment, or setting out an arbitrator's award, are made in the first person. And an indenture may be validly made by the grantor making the grant in the first person, and the grantee joining with him in sealing it (Litt. s. 372). Indentures, however, are now invariably drawn in the third person, and, as Littleton says, "This forme of indentures is the most sure making, because it is most commonly used" (Litt. s. 371). They are written without punctuation, though of late it has become customary where the instrument is of a very complicated character, to endeavour to simplify it by dividing it into numbered paragraphs.

Deed of  
grant.

All that an ordinary deed of grant need necessarily contain is a sufficient description of the grantor, grantee,

(*d*) As to the Acts rendering indenture necessary in certain cases,  
Co. Litt. 229 a.

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and land granted, and apt words of conveyance of the interest intended to be assured. The description is, or was called the *premises*, and the words of conveyance were called the *operative words*. And this was in effect all that ancient deeds of grant did as a rule contain (see Litt. s. 371). But partly because conveyances now are often more complicated in their nature than formerly, and partly because the parties generally wish to have the transactions stated more fully, deeds of grant are now not limited to setting out the premises and operative words. These, however, are still the essential part of the instrument, and any part of the other matter which may conflict with them is overborne by them.

Adapting, then, the precedent of an ancient charter Littleton's confirming a feoffment, given by Littleton (Litt. s. 371), precedent. to the law as to grants of land as it stands to-day, a deed of grant would run as follows :

THIS INDENTURE made BETWEEN R. of P. of the one part and V. of D. of the other part WITNESSETH that the said R. of P. doth grant to the aforesaid V. of D. the land [*describe land granted*] TO HAVE AND TO HOLD the said land unto and to the use of the said V. of D. in fee simple IN WITNESS WHEREOF the parties aforesaid have put their seals.

This deed of grant, it will be seen, consists of a single sentence ; and this one sentence forms the basis of all conveyances, however complicated they may be, and whatever special purposes they may be intended to carry out. These special purposes are carried out, not by altering this simple sentence, but by adding to it, and the additions to it are, by the practice of conveyancers, invariably inserted in a certain well-known order, with the result that when another lawyer desires to see the particular effect of any deed he has not to peruse the whole instrument, but can



**Sect. 5.**            turn at once to the part of the deed where the additions affecting the matter in question are to be found.

Arrangement  
of subject-  
matter.

The most common and important purposes for which assurances of lands are used are, in the first place, for conveying an interest to a grantee out and out (or assurances by way of purchase); in the second place, for conveying interests to different grantees born and unborn, in succession (or assurances by way of settlement), and in the third place for conveying an interest to a grantee to secure a debt (or assurances by way of mortgage).

We will now consider shortly the principles regulating the forms of deeds adapted to carry out each of these purposes and the deed itself.

## PART II.

### ASSURANCES BY WAY OF PURCHASE.

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## SECTION I.

## A MODERN DEED OF GRANT.

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By "purchase" is meant a title accruing, as Lord COKE Meaning of "purchase." says, "most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase." But though that may be its meaning, most properly it has, like most terms in English law, a number of other meanings. Thus, in the Inheritance Act of 1833, it means any title accruing otherwise than by descent, or by escheat, partition, or inclosure by the effect of which the land shall have become part of, or descendible in, the same manner as other land acquired by descent (3 & 4 Will. 4, c. 106, s. 1). Throughout the Conveyancing Act, 1881 (save in s. 3, where its meaning is confined to a transfer on sale) it means a transaction by which an interest in property is transferred or intended to be transferred for valuable consideration, whether the grantee takes such interest as vendee, mortgagee, or lessee (44 & 45 Vict. c. 41, s. 2 (viii.)). And the strict legal meaning seems to be a title accruing in any other way than by act of law (see Hargrave's Note, Co. Litt. 18 b).

As, therefore, popular usage and Acts of Parliament have sanctioned the use of the word in a variety of senses, it may be permissible for present purposes to use this plastic word in a sense somewhat different from any of those given to it above, and mean by assurances by way of purchase, absolute assurances as opposed on the one hand

**Sect. 1.** to assurances by way of mortgage, which are assurances conditional on the repayment of the mortgage debt, and on the other hand to assurances by way of settlement, which are assurances of one interest among a number of persons in succession. Most assurances of purchase used in this sense are made on sale, and we will deal primarily with these, but assurances on gift will, as far as is necessary, be also considered under this head.

A modern conveyance on sale.

A modern assurance on sale of a freehold interest in land, where made by indenture of grant, would now run much as follows :

THIS INDENTURE made the first day of January one thousand eight hundred and ninety-nine BETWEEN John Doe of Long Acre in the parish of Morton Pinkney in the county of Northampton Esquire of the one part and Richard Roe of No. 1001 Capel Court in the city of London stock-broker of the other part WHEREAS by an indenture dated the twenty-ninth day of January one thousand eight hundred and fifty-eight and made between Samuel Snow of the parish of Duston in the county of Northampton farmer of the one part and Charles Chalk of No. 2002 the Mare Market in the city of Northampton milkman of the other part the hereditaments hereby intended to be conveyed together with other hereditaments became vested in the said Charles Chalk for an estate of inheritance in fee simple AND WHEREAS by an indenture dated the twenty-first day of September one thousand eight hundred and seventy-five and made BETWEEN the said Charles Chalk of the one part and the aforesaid John Doe of the other part the said Charles Chalk for the consideration therein mentioned assured unto the said John Doe his heirs and assigns the hereditaments hereby intended to be conveyed together with other hereditaments to hold the same unto and to the use of the said John Doe his heirs and assigns for ever AND WHEREAS the said John Doe has agreed with the aforesaid Richard Roe for the sale to him subject to such reservation as is hereinafter contained for the sum of six

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hundred and fifteen pounds of the hereditaments hereby intended to be assured in fee simple in possession subject to the subsisting yearly tenancy of Thomas Trotter Now THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of six hundred and fifteen pounds now paid by the said Richard Roe to the said John Doe the receipt whereof the said John Doe hereby acknowledges the said John Doe as beneficial owner conveys unto the said Richard Roe all that piece or parcel of land known as the One Horse Farm now occupied by Thomas Trotter aforesaid situate in the parish of Morton Pinkney and county of Northampton and containing by recent admeasurement seventy-five acres three roods and one perch and being bounded on the south side by the Weedon Road beginning at the tree called the Great Ash and on the north and east sides by the farm belonging to the said John Doe known as Long Acre and on the west by the stream called the Sopsuds Stream which premises with their respective boundaries are for greater clearness delineated on the plan drawn in the margin of these presents and therein coloured pink such plan being taken from the ordnance survey map of the said parish of Morton Pinkney Except and reserving unto the said John Doe his heirs and assigns full and free right and liberty at all times hereafter to pass and repass with cattle and other animals from the farm known as Long Acre aforesaid over the lands hereby assured along the roadway marked cattle path on the said plan to the cattle pond for the purpose of watering such cattle and other animals at the point on the Sopsuds Stream before mentioned marked with a black cross on such plan TO HOLD the same unto and to the use of the said Richard Roe in fee simple subject to the subsisting tenancy aforesaid AND the said John Doe hereby acknowledges the right of the said Richard Roe to the production of the documents of title short particulars whereof are set out in the schedule hereto and to delivery of copies thereof and hereby undertakes with the purchaser for the safe custody of the documents IN WITNESS whereof the said parties have hereunto set their hands and seals.

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## THE SCHEDULE ABOVE REFERRED TO.

1815 June 17th and 18th.      INDENTURES of lease and release  
so dated the latter made  
BETWEEN John Black of the  
one part and Samuel Snow  
of the other part.

1858 January 29th.      } The hereinbefore recited INDEN-  
1875 September 21st.    } TURES of these dates.  
JOHN DOE.                      (L.S.)

SIGNED SEALED AND DELIVERED by the said John Doe in  
the presence of

JOHN DOREY,  
Solicitor,  
3003 Bedford Row, E.C.

Modern conveyance compared with Littleton's deed.

Referring back to the elementary form of conveyance in Part I. (*supra*, p. 49), the reader will now see what additions are made to it in a modern conveyance on sale, and the order in which such additions are made. Taking that form, the additions are as follows :

“This Indenture made [*date*] between R. of P. of the one part and V. of D. of the other part [*recital of title of grantor ; recital of agreement to sell*] Now this Indenture witnesseth [*consideration ; receipt*] that the said R. [*character in which he conveys*] doth hereby convey unto the aforesaid V. and his heirs the land, etc. To hold the said land [*reservation and exceptions*] unto and to the use of the said R. in fee simple [*covenants and conditions*]. In witness whereof the parties aforesaid have hereunto set their hands and seals, etc.’

Thus, as has already been pointed out, the simple sentence which Littleton gives as the form of a deed or grant in his time, is to-day the essential part of the modern conveyance, the foundation upon which the modern conveyance is built.

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In an ordinary conveyance, where the only object of the deed is to transfer property assured by it, this sentence, with the above-mentioned interpolations, constitutes the whole instrument; but where there are several objects to be accomplished by the one deed, a single sentence is not enough. In such cases, however, the sentence is merely repeated as often as is necessary, and with such adaptations as are necessary to carry out the other purposes. In such repetitions, parts of the sentence are left out, but one part is invariably repeated, and that is what is called the *testatum* (*Now this Indenture witnesseth*), and every deed that has more than one testatum is commonly said to have so many *witnessing parts*.

•

As will be seen, the order of the parts of an indenture of purchase is as follows: *Date*; *Parties*; *Recital of grantor's title*; *Recital of contract of sale*; *Testatum*; *Consideration*; *Receipt*; *Operative words*; *Parcels*; *Habendum*; *Covenants and reservations*; *Acknowledgment and undertaking*; *Testimonium*. We shall consider, shortly, each of these clauses.

Order of  
parts of  
conveyance.



SECTION II.

DATE, PARTIES, AND RECITALS.

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Date of  
indenture.

A MODERN deed of grant, then, now begins by stating the *date* on which the deed is executed : "This Indenture made the first day of January one thousand eight hundred and ninety-nine." This is not, strictly speaking, any part of the deed. A deed is made from the date upon which it is delivered, and that date is its true date. Accordingly, if the recited date is different, it will not be the true date of instrument. And where the recited date is not the date of delivery, the court, in order to ascertain from what time the deed operated, will admit oral evidence to prove the date of delivery (Shep. Touch. 55). And the fact that the recited date is erroneous or impossible (such as the 30th of February), does not affect the validity of the deed (*Goddard's Case*, 2 Rep. 4 b). It should be added that in deeds poll, the date, instead of being put at the commencement of the instrument, is put at the end of it (see *infra*, p. 90).

Parties.

After the date comes a description of the *parties* to the instrument "Between John Doe of Whiteacre in the parish of Morton Pinbury in the county of Northampton Esquire of the one part and Richard Roe of 1001 Capel Court in the city of London stockbroker of the other part."

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As to this clause, there is only one rule of law, and it has already been referred to. The description of the parties to a deed must be sufficient, that is, it must be such as will identify them. This object is, in practice, attained by describing them by their names and additions, that is, addresses, and rank or business. If one of the parties be a woman, it is usual to add also whether she is a spinster, wife, or widow, and if she is a wife, to set out whose wife she is. If a party has, either by law or by courtesy, any title of honour, it should be set out in full. Where it is his legally, it should be set out thus: "The Most Honorable Robert Marquis of Salisbury"; where it is by courtesy "The Right Honourable James Edward Hubert Gascoigne Cecil commonly called Viscount Cranborne." In the case of persons ranking as peers, whether legally or by courtesy, it is usual to omit their place of residence in describing them. Once the parties have been sufficiently described, they are throughout the rest of the deed referred to simply as the "said John Doe," or "the said Marquis of Salisbury." Sometimes, however, where there are many persons in one or in each of the parts, it is convenient to add to their original descriptions, a statement that they shall, in the rest of the deed, be described by the capacity in which they are acting as "hereinafter called the vendors."

Formerly, it was necessary to make every person who took any immediate benefit under a deed of grant, a party to the deed (Co. Litt. 231 a). This is no longer necessary, as it has been enacted by the Real Property Act, 1845 (8 & 9 Vict. c. 108) (s. 5), that "under an indenture executed after October 1st, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." But the practice still is to make all persons taking immediate benefits,

**Sect. 2.** parties, though, frequently, they never execute the deed (*infra*, p. 88).

Number  
of parts.

It is usual to have as many parts to a deed as there are persons who are acting in different characters. Thus, if a deed of grant be made by joint tenants to joint grantees, however many tenants there may be on each side, there will be only two parts, the grantors being (as vendors) of the one part, and the grantees being (as purchasers) of the other part. But if the grant were made by the owner and his mortgagee to the joint grantees, there would be three parts, the owner being (as owner) of one part, the mortgagee (as mortgagee) of another part, and the joint grantees (as purchasers) of the third part. Where there are only two parts, the parties are described as “of the one part,” and “of the other part”; where there are more than two, as “of the first part,” “of the second part,” and so on. It is now usual to put the person who acts as vendor, as of the first part, though some conveyancers prefer to put the owner of the legal estate first, whether he is acting as vendor or not. The grantee usually comes last, unless there is some other person made party for his (the grantee’s) benefit, such as a trustee to bar dower.

Recitals  
of title.

Next after the parties comes the *recital of the title* of the vendor.

“Whereas by an indenture dated the twenty-ninth day of January one thousand eight hundred and fifty-eight and made between Samuel Snow of the parish of Duston in the city of Northampton farmer of the one part and Charles Chalk of No. 2002 The Mare Market in the city of Northampton milkman of the other part the hereditaments hereby intended to be assured together with other hereditaments became vested in the said Charles Chalk for an estate of inheritance in fee simple And whereas by an indenture dated the twenty-first day of September one

thousand eight hundred and seventy-five and made between the said Charles Chalk of the one part and the aforesaid John Doe of the other part the said Charles Chalk for the consideration therein mentioned assured unto the said John Doe his heirs and assigns the hereditaments hereby intended to be conveyed together with other hereditaments to hold the same unto and to the use of the said John Doe his heirs and assigns for ever."

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Title, as Lord COKE says, "signifieth the means whereby a man cometh to land" (Co. Litt. 345 b), and a recital of title is simply a narrative of the various instruments, acts of law and facts generally, the effect of which is to vest in the grantor the estate in the land which is the subject-matter of the conveyance.

Meaning  
of "title."

It has become customary of late to dispense with recitals of title in simple cases. This seems a practice scarcely to be commended, since owing to the provisions of s. 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), and more especially in view of the interpretation put upon those provisions in *Bolton v. London School Board*, 7 Ch. D. 766, they may be made not merely valuable evidence of title, but also, in certain cases, a means of curing in time a defective title. Section 2 enacts that "recitals, statements, and descriptions of facts, matters, and parties contained in deeds . . . twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." To show how this enactment may affect titles, take for example a title to land derived in this way: Freeholds settled on A. for life, then to his only son B. for life, then to B.'s issue in tail, and if B. dies without issue to the right heirs of A. in fee simple. C., the only daughter of A., is selling as A.'s heir-at-law, and the deed recites that A. is dead intestate, and B. is dead without issue, and that C. is A.'s only other child.

The use of  
recitals of  
title

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Twenty years after the sale by C. the purchaser from C. wants to re-sell. In making title, he is under no obligation to show that A. died intestate, or that B. died without issue, or is dead at all, or that C. was the heir-at-law of A. These facts must be assumed to be true until evidence is given to prove the contrary. If, as often happens, the only evidence of B.'s death was that he had gone abroad and been heard of no more, and of his having no issue, that no one ever heard that he was married, but for this recital and its statutory effect the purchaser from C. would have great difficulty in showing a good title. And further, if the deed, without tracing C.'s title, had simply recited that she was seised in fee simple at the date of the conveyance, the purchaser from her would, according to *Bolton v. London School Board, supra*, be relieved, on reselling twenty years later, of the necessity of tracing his title beyond this deed. In an open contract the vendor must, as a rule, commence his title with an assurance at least forty years old (s. 1, Vendor and Purchaser Act, 1874); but because of s. 2, the court, in that case, held that if a deed twenty years old stated that the then grantor was seised in fee that is a sufficient title in spite of s. 1. The decision seems to confuse evidence of title with the right to a certain length of title, but as it has not been, and may never be, reversed, conveyancers should take advantage of it for the benefit of their clients. •

The misuse  
of recitals  
of title.

On the other hand, badly drawn recitals may disclose defects of title which would otherwise have been outside the forty years as to which a good title must be shown, or instead of assisting in rendering the object of the indenture clear they may confuse or defeat it (*Moseley v. Motteux*, 10 M. & W. 533), or by mistakes as to facts, they may prejudice one of the parties to the deed by estopping him from denying what, nevertheless, is not true (see *supra*, p. 45). For these reasons conveyancers should take the greatest care to secure that all recitals are both correct and judicious.

The only conceivable mode of tracing the devolution of title is by narrating in chronological order the different instruments and acts of law which ultimately result in vesting the property to be conveyed in the grantor. Sometimes it happens that the property consists of two or more parcels which came to the grantor under distinct titles. In such case, of course, each title must be traced separately. But whether there are two or more separate titles to different parts of the property intended to be conveyed, or whatever the complications in the devolution may be, nothing will justify a departure from the strict chronological order in tracing out the devolution of each branch of title.

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Order of  
recitals of  
title.

Recitals of title—or narrative recitals, as they are sometimes called—may be either general or particular. The first of the two recitals given above is general. Without stating the nature of the transaction between Samuel Snow and Charles Chalk, it states that the effect of the transaction was to vest in the latter an estate of inheritance in fee simple in the land. The second recital is particular. It states that Charles Chalk conveyed his estate in the land to John Doe, for valuable consideration. As a rule the first instrument recited—the *root of title*, as it is called—is recited generally, the chief exceptions being in the case of its being a will or a lease.

General and  
particular  
recitals.

After the recital of title comes the *recital of the contract*.

Recital of  
contract.

“And whereas the said John Doe has agreed with the aforesaid Richard Roe for the sale to him subject to such reservation as is hereinafter contained.”

In simple cases of sale out and out of an interest in land this recital, like the recitals of title, is often dispensed with and with considerable reason. The sole object of this recital is to explain the nature of the transaction which the instrument is intended to carry through. Where that transaction is complicated, and so needs all the aids to



**Sect. 2.** clearness which can be found, the recital of contract—or, as it is more usually called, the introductory recital—sometimes performs a useful function. But in an ordinary case of sale in fee where there are no incumbrances or reservations, and where the sole object of the deed is to transfer the vendor's property to the vendee, it seems useless. The nature of the transaction is sufficiently manifest from the words following the testatum.

Observations  
as to recitals

With regard to recitals of title and of contract, one or two propositions may be laid down. In the first place, if the operative part of the deed is clear and precise, nothing contained in the recitals will control it. Thus, where the recital of title showed a defect in the title, that did not prevent the grantee, on suffering damage through this defect, from recovering on the grantor's covenants for title (*Page v. Midland Rail. Co.*, [1894] 1 Ch. 11, and see *infra*, p. 68). If it is intended that the grantee should take subject to the disclosed defect, the covenant for title should be so limited. On the other hand, if the recital be clear and precise, and the operative part ambiguous (*Re Mitchell's Trusts*, 9 Ch. D. 9) or general in its terms (*Jenner v. Jenner*, L. R. 1 Eq. 361), the recitals will be held to explain and limit the meaning of the operative parts. It used to be thought, that general words in the operative parts could be limited by recital only in case of deeds of release, but that clearly is not now the law (see *per* WOOD, V.-C., in *Rooke v. Lord Kensington*, 2 K. & J. 753; *Williams v. Pinckney*, 77 L. T. 700).

*Testatum.*

Next follows the *testatum* "Now this Indenture witnesseth."

- These words are of no importance as affecting the operation of the deed. Their sole use is to direct attention to the object which the deed is intended to effect. Accordingly, if the deed is intended to effect several distinct objects, as has already been pointed out, the statement of

each new object is introduced by a new testatum in the form "And this Indenture further [or also] witnesseth." Sect. 2

Then follows the recital of the *consideration*.

"That in pursuance of the said agreement and in consideration of the sum of six hundred and fifteen pounds now paid by the said Richard Roe to the said John Doe." Consideration.

Where there is no recital of the contract, of course the words "in pursuance of the said agreement" are omitted.

Where any valuable consideration is given that should be truthfully set out in the deed, otherwise the parties to it and their solicitors may lay themselves open to a charge under s. 5 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), which renders every person liable to a fine of 10*l.* who, with intent to defraud, executes any instrument in which the facts and circumstances affecting its liability to duty are not fully and truly set forth; or being employed or concerned in or about its preparation, neglects or omits fully and truly to set forth therein these facts and circumstances. This section, it will be seen, does not enjoin the parties and solicitors to set out in all cases the consideration; it merely makes it penal to suppress or misstate the consideration with intent to defraud. And a deed executed for valuable consideration is perfectly good, though it contains no reference to such consideration. And if, by an oversight, a deed given for valuable consideration does not state this fact, then if the absence of consideration would affect its operation the court will admit oral evidence to prove that the consideration was given, provided such evidence does not contradict any statement in the deed.

As a rule the absence of consideration does not affect the operation of a deed (*supra*, p. 41). Sometimes, however, Where absence of consideration is important



**Sect. 2.** it does. Thus consideration is necessary to the grant of a lease by a freeholder by bargain and sale (*supra*, p. 14). Such grants are sometimes used for the purpose of vesting terms in trustees or mortgagees to raise or secure money. Again, not merely valuable consideration, but the adequacy of the consideration is important in the case of a deed containing a covenant in restraint of trade (*Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Sm. L. C.)—a very common covenant in purchase deeds of businesses as going concerns (see *Hawkesley v. Outram*, [1892] 3 Ch. 359). Again, a voluntary grant is liable to become *ipso facto* void as against the grantor's trustee in bankruptcy, in case the grantor becomes bankrupt within two years after its execution ; and in case the grantor becomes bankrupt, not within two, but within ten years after its execution, the grant will be void, unless the grantee can show that at the time of execution the grantor was able to make the grant without rendering himself insolvent, and that the property passed to the grantee on the execution of the deed (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47). It may be noted that the avoidance of the grant in both these cases only commences from the bankruptcy ; and all *bonâ fide* dealings for value by the grantee with the property granted, before that date, are good (*In re Carter and Kenderdine*, [1897] 1 Ch. 776). Lastly, a voluntary grant of lands was formerly void against a subsequent purchaser for value from the grantor, but this has been altered by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

After the recital of consideration comes the *receipt*.

Receipt.

“The receipt whereof the said John Doe hereby acknowledges.”

Formerly this receipt in the body of the deed was not considered sufficient evidence of the payment of the

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consideration and another receipt was indorsed on the deed. An indorsed receipt, however, has been declared unnecessary by s. 54 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) as to deeds executed since the commencement of that Act (January 1st, 1882), and it is not usual now to indorse one. Also in such deeds the existence of a receipt either in the body of or indorsed on the deed estops the vendor from denying that the purchase money has been paid as against a *bonâ fide* purchaser from the vendee who had not, when he purchased, actual notice that the vendee had not paid the purchase money (s. 55). And further, if a solicitor produces an executed deed containing a receipt in the body of the deed, or one indorsed on the deed, and signed by the person entitled under the contract of sale to receive the purchase money, the purchaser will be justified in paying the purchase money to the solicitor without his producing any separate authority to receive the same (s. 56). By s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), this provision applies where the vendors are trustees; and their permitting their solicitor to have the custody of a purchase deed containing a receipt clause and to receive the purchase money, is not in itself to constitute a breach of trust.

## SECTION III.

OPERATIVE WORDS, PARCELS, AND  
HABENDUM.

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THEN the deed proceeds :—

Operative  
words.

“ The said John Doe, as beneficial owner, conveys unto the said Richard Roe.”

These are called the *operative words*, but, properly speaking, the operative words include also the parcels or description of the property conveyed, and reservations and the covenants.

Covenants  
for title.

One of the most remarkable sections of the Conveyancing and Law of Property Act, 1881, concerns these operative words. Previous to the commencement of that Act it was the custom on a sale of lands to require the vendor to enter into certain covenants to guarantee the vendee against loss resulting from any defect in his title. These were called covenants for title, and they were always

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—

qualified—that is, they made the vendor liable only for the acts or omissions of himself and of those through whom he derived title otherwise than by purchase for value. A settlement on marriage, though, strictly speaking, a purchase for value, was not, as far as covenants for title were concerned, so regarded. The vendor covenanted in other words against the acts and omissions of himself, his ancestors and testators, and any one lawfully claiming through him or them.

These were called “usual” covenants for title by a vendor, that is, the covenants which the vendee was entitled to compel the vendor to enter into where there were no express stipulations in the contract of sale upon the point; and they were as follows :

First, a covenant that the vendor had with the concurrence of every other person, if any, conveying by his direction, full power to convey the property, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed. Secondly, a covenant that the vendee should quietly enjoy the property conveyed without lawful interruption or disturbance by the vendor or any one claiming through him or his ancestors or testators, other than persons claiming in respect of estates subject whereto the conveyance was expressly made. Thirdly, a covenant that the property conveyed was freed from or indemnified against any estates, incumbrance, claims, or demands made, occasioned or suffered by the vendor or anyone claiming through him or his ancestors or testators, other than those subject to which the conveyance was expressly made. Fourthly, a covenant that the vendor and those, if any, conveying by his direction, and those who had any interest in the property conveyed, derived through his ancestors or testators, other than persons having interest subject whereto the conveyance was expressly made, would from time to time execute any assurance for further or more perfectly assuring the

(1) Right to convey.

(2) Quiet enjoyment.

(3) Freedom

(4) Further assurance.

**Sect. 3.** title (a) on the part of the grantor, which supposition seems unfounded (see Butler's Note, Co. Litt. 384 a). But to remove any doubt on the point by s. 4 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), it was enacted that the word "grant," or "give" shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word "give" or the word "grant" may by force of any Act of Parliament imply a covenant. The word "grant" does imply covenants in certain cases under certain Acts of Parliament. Thus under the old Registry Acts for Yorkshire (6 Anne, c. 35, ss. 30, 34 ; 8 Geo. 2, c. 6, s. 35), the words, *grant*, *bargain* and *sell* in a deed of bargain and sale in fee simple, implied

(a) The differences between a warranty of title and a covenant of title may be shortly stated thus : Strictly speaking, a warranty of title arose out of tenure. When a lord enfeoffed (when the apt word to use was *dedi*, or I give) a tenant of a fief, the relation of lord and tenant imposed on the lord an obligation to defend the tenant's holding against all comers. Covenants for title, on the other hand, are matters of contract between the landlord and tenant. It follows from this, that an implied warranty could not be altered by express agreement, while an implied covenant could. When the Statute *Quia Emptores* prohibited subinfeudation, as the relation of lord and tenant could no longer be created between grantors and grantees of fees simple, there was no longer an implied warranty on such grants. There continued, however, to be such a warranty on grants in fee tail and for life, where, in creating them, the old word *dedi*, or I give, was used. If "grant" was used, that not being an apt word to enfeoff, there was no implied warranty. Grants in fee simple were still sometimes expressly warranted when the apt word for doing so was *warrantizo*. This was done when a tenant in tail, alienating his estate tail, desired to bar the heirs of the body as against his grantee. As the warranty—like the fee tail—descended to the warrantor's heir, the latter was bound by it not to disturb the grantee's title, or, if he did, to make good the loss to the grantee. Another difference between a covenant for title and a warranty is that a covenant for title is nearly always qualified (see *supra*, p. 68), while a warranty was unqualified : it bound the warrantor to defend the warrantee's title against all the world. For an interesting discussion of the subject of warranties, see Butler's Note, Co. Litt. 384 a.

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covenants for quiet enjoyment and for further assurance. And in conveyances under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18, s. 132), covenants by the vendors are still implied by the word "grant" for right to convey for the estate granted free from incumbrances, for quiet enjoyment, and for further assurance, unless there is an express covenant limiting or negating such implication. The word "give" does not, it appears, imply under any Act of Parliament covenants for title, but in grants of interest less than fee simple, it did at common law imply a warranty of title during the life of the grantor (Co. Litt. 384 a). This common law warranty is, as we have seen, taken away by the Real Property Act, 1845.

Owing to the fact that the Act last mentioned used the word "grant" in enacting that corporeal hereditaments might be conveyed like incorporeal hereditaments, a superstition grew up among conveyancers that that word had in some way or other a mysterious statutory effect, which superstition only yielded to another enactment to the effect that the word "grant" was not necessary in order to convey tenements or hereditaments corporeal or incorporeal (Conveyancing and Law of Property Act, 1881, s. 49). A similar superstition seems now to be growing up with regard to the word "convey," because that word is used throughout the Conveyancing Acts. Though there is no objection to the use of this word, neither, it need hardly be pointed out, is there any legal necessity for its use; and it has certainly no advantages over the more ancient and honourable word "grant."

Sometimes after the name of the grantee in the operative clause, words are added indicating the interest he is to take, as, in the instance above given, "to Richard Roe and his heirs." This is done through over caution in some cases, and in others through ignorance. If the habendum is properly drawn, these words of limitation are quite unnecessary,

Words of  
limitation in  
operative  
clause.



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and the habendum is the proper place for stating the extent and nature of the interest granted.

**Parcels.**

The office of the *parcels* (*supra*, p. 55) is in the words of Shepherd's Touchstone (p. 74), "to comprehend the certainty of the thing granted," and if they do this, if they make certain what is really the subject-matter of the assurance, it is of no concern what words are employed. As a matter of fact, however, more or less technical words are used almost invariably. Thus a house is usually described as a "messuage," and the word "messuage" includes not merely the house itself, but the outbuildings, courtyard and garden occupied therewith, unless the context shows that a different meaning was intended. The word "house" would have the same significance. The word "tenement" is generally used as equivalent to house or messuage, and in this connection is construed as having that meaning, though, as we have already pointed out, tenements really mean anything which is the subject of tenure (*b*). "Hereditaments" is also a word constantly used in assurance, and when so used is applied indiscriminately to all interests in land. Leaseholds are constantly described as the "hereditaments intended hereby to be assured." As the word is already applied by practically all lawyers, to interests such as life interests (see *supra*, p. 5), which, though freehold in their nature, are just as little heritable as leaseholds, there is little objection to this practice, provided it is clear what is the thing intended to be conveyed. That indeed is, as has already been said, the important point, and all that the law requires. It can scarcely be said, however, that the use of the technical language of English law tends to facilitate to any marked degree its attainment.

(*b*) Tenements, when used in connection with the Statute *De Donis* mean hereditaments which may be entailed under that statute. Accordingly, copyholds and chattels real which are the subject of tenure, though not of common law tenure, are not tenements within the Statute *De Donis*.

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Description  
of property  
conveyed.

Where the assurance is of all the hereditaments conveyed by another deed, it is usual merely to copy the parcels from that deed, simply altering expressions which have ceased to apply ; as, for example, altering the name of the occupier, where, in the earlier deed, the hereditaments are described as being in the occupation of a person who has since ceased to be tenant. Where, however, the assurance is of part only of the hereditaments conveyed by the earlier deed, a new description is necessary. In drafting this, one or two rules, or rather presumptions of law, should be remembered. In the first place, a grant of a parcel of land carries with it, without express mention of them, all the minerals on the land, and all the buildings and fixtures and chattels vegetable on it. In the second place, it carries with it, without express mention, all “commons, hedges, ditches, fences, watercourses, liberties, privileges, easements, rights, ways, and advantages whatsoever appertaining, or reputed to appertain, to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to the land or any part thereof ” (as to the meaning of “enjoyed,” in this section, see *Birmingham, etc., Banking Co. v. Ross*, 38 Ch. D. 295 ; Conveyancing and Law of Property Act, 1881, s. 6 (1) ) ; and if the land have houses or buildings upon it, all rights of light and other easements enjoyed with it, go with it (s. 6 (2) ). And, in the same way, the conveyance of a manor without further words, carries with it all rights and privileges appendant or appurtenant to the manor (s. 6 (3) ). Formerly, because there was some doubt as to whether all these accessory rights and privileges passed without express mention—and for other reasons which need not in this scrupulous age be mentioned—it was customary for conveyancers to insert after the description of the property conveyed, what were called general words. This practice is not followed now, being no longer either necessary or profitable. Lastly, if the grantor wishes to limit the operation of the grant by reserving any



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rights over the land granted, or preventing any easements or other rights enjoyed with the land granted over any adjoining land of his at the time of the grant, from attaching after the grant, he must expressly reserve or except them from his grant (see *Broomfield v. Williams*, [1897] 1 Ch. 602).

**Map of premises.**

Frequently, for the purpose of more clearly defining the land conveyed, a map of it is drawn in the margin of the deed ; and as this map is, not infrequently, very carelessly drawn, some conveyancers add after the reference in the body of the deed to the map, the words “ which plan is intended to be taken merely as assisting and explaining the description hereinbefore contained, and not as in any way governing, controlling, restricting, or enlarging the same in the event of any variance or discrepancy between it and the said description.” Where, however, the plan is taken from the ordnance survey, this precaution is unnecessary. It is to be noted, however, that in the ordnance survey map, the acreage of fields, etc., is calculated from the centre of the hedges, without regard to the ownership of the hedge and the ditch beyond it—if there be one—which, by presumption, is the property of the owner of the hedge (*Marshall v. Taylor*, [1895] 1 Ch. 641). Accordingly, there may be a discrepancy between the acreage as set out on the map, and as stated in the parcels, if the area of the hedges and ditches be included in the latter. Again, maps are usually coloured, so as to indicate that the land granted terminates with the verge of the road or the river on which it abuts. But the presumption is that the owner of land abutting on a roadway (*Beckett v. Corporation of Leeds*, L. R. 7 Ch. App. 421), or street (*In re White's Charities*, [1898] 1 Ch. 659), or non-tidal river (*Dwyer v. Rich*, Ir. Rep. 6 C. L. 146), is also the owner of the land forming the road or street, or the bed of the river to the middle line (*ad medium filum*) and that when the owner of land of this kind conveys it to a purchaser, he

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intends to convey, not merely the land as set out on the map (or, for that matter, as described in the parcels), but also the land forming his half of the site of the road or street, or of the bed of the river, on which the land conveyed abuts (*Micklethwait v. Newlay Bridge Company*, 33 Ch. D. 133). If he intends to reserve this unmentioned land, he should expressly say so in the conveyance (*ibid.*). However, if there be no express reservation, nevertheless the presumption that the conveyance was intended to include the land may be rebutted by surrounding circumstances (*Ecroyd v. Coulthard*, [1897] 2 Ch. 554), or by something inconsistent with the presumption appearing on the face of the deed (*Pryor v. Petre*, [1894] 2 Ch. 11).

All *exceptions*, and most *reservations*, out of the property granted, should follow the parcels. By *exception* is meant something *in esse* at the date of the grant which is excepted from the grant, such as an exception of mines and minerals. By *reservation*, on the other hand, is meant something not *in esse* at the date of the grant, but newly created by the grant (Co. Litt. 47 a). Reservations are of two kinds: first, reservations of some right over the land conveyed, such as a right of way or other easement, and, secondly, reservations of rents issuing out of the land conveyed. The difference between reservations of the first kind and exceptions is of no practical importance, and, as a matter of practice, they are both introduced by the double expression "Except and reserving." Reservations of the second kind, however, are the creation of something entirely new, and they are always inserted, not after the parcels, but after the habendum (see *infra*, p. 96).

Formerly, it was the practice where the conveyance was of a fee simple or of the whole interest—whatever it might be—of the grantor, to insert after the parcels, and before the reservations and exceptions, what was called an *all the*

"All the estate" clause.

**Sect. 3.**

Section 63  
Convey-  
ancing Act,  
1881.

*estate clause.* This ran much in this way: “And all the estate right title interest claim and demand whatsoever of the said John Doe in to or on the same premises or any part thereof.” Whether this clause had at any time any effect, is doubtful, but whether it had or had not, its insertion is unnecessary now, since s. 63 of the Conveyancing and Law of Property Act, 1881, enacts that “every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.” This enactment applies, however, only so far as no contrary intention appears, and is to have effect subject to the terms of the conveyance and the provisions therein contained (s. 63 (2)), and it applies only to conveyances executed after the Act (s. 63 (3)). In practice, the “all the estate” clause is now usually omitted in reliance on this enactment.

Effect of  
s. 63.

The sole purpose of s. 63 of the Conveyancing Act was to abolish the supposed necessity of inserting an “all the estate” clause in conveyances, and, therefore, no doubt it will be construed as simply implying such a clause. In other words, it will have no further effect upon the operation of a conveyance than would formerly have been brought about by the insertion of that clause. How small that effect was appears from the recent case of *Williams v. Pinckney* (77 L. T. 700). In that case, one of several grantors had a mortgage of his own on the land conveyed. In the conveyance no mention was made of the mortgage, and there was an “all the estate” clause:—*Held*, that from the general purport of the deed, it was clear that there was no intention to convey the land freed from the mortgage.

Next comes the habendum :

Habendum.

“To hold the same unto and to the use of the said

Richard Roe in fee simple subject to the subsisting Sect. 3.  
tenancy aforesaid."

The office of the habendum is to "name againe the feoffee and to limit the certaintie of the estate" (Co. Litt. 6 a), or, in other words, to set out again the name of the grantee, and the interest he is to take. Formerly Words of limitation. there were words so apt for the description of estates of inheritance that, in the words of Lord COKE, "they could not be expressed by any other words or by any periphrasis or circumlocution" (Co. Litt. 9 a). As Littleton says (s. 1), "If a man would purchase lands or tenements in fee simple it behoveth him to have these words in his purchase, 'To have and to hold (c) to him and to his heires'; for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, 'To have and to hold to him for ever'; or by these words 'To have and to hold to him and his assigns for ever'; in these two cases he hath but an estate for term of life, for that there lacke these words (his heires) which words onely make an estate of inheritance in all feoffments and grants." In the same way the apt words to create a fee tail were to the grantee and "the heirs of his body" if the fee was in tail general, and "the heirs male of his body" if in tail male, and the "heirs of his body by his wife" so and so if in tail special. If the conveyance was to an individual as a corporation sole, as to a bishop as the bishop of a certain diocese, the apt words to convey a fee simple were to him "and his successors," save in the case of the sovereign, who could and can take a fee simple without words of

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(c) "To have" is properly the habendum; to hold is properly the tenendum, and was formerly used to indicate whether the grantee in fee simple was to hold from the grantor or his lord. Since the statute *Quia Emptores* the tenendum is useless (Co. Litt. 6 a). It is usual now, however, to use the expression "to hold" and to omit "to have," and still, as the function fulfilled by the expression is not that of the tenendum but of the habendum, to call it the habendum.

**Sect. 3.** inheritance (as these phrases are called), as can also all corporations aggregate, such as municipal corporations, public companies, universities, and the like. With the exception of these, a limitation to any person without words of inheritance conveyed only an estate for life (2 Bl. Com. 108). These rules were equally applicable to limitations of equitable estates under executed trusts (*Re Whiston*, [1894] 1 Ch. 661), but they do not, and never did, apply to limitations under executory trusts or by will.

Section 51  
Convey-  
ancing Act,  
1881.

The law upon this point is now, to a certain extent, altered by s. 51 of the Conveyancing and Law of Property Act 1881. The old words of limitation are still perfectly appropriate for the limitation of estates of inheritance, but it is enacted that henceforth "In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body."

Extent of  
s. 51.

With regard to this enactment three points should be noted. In the first place, as it refers merely to limitations in a deed, it does not apply to surrenders or admittances of copyholds, though it would refer to settlements of equitable interests in copyholds (see *supra*, p. 35). In the second place, it does not permit any other terms than "fee simple," etc., to be substituted for the ancient forms of limitation. Accordingly, the result is merely to give an alternative series of phrases for those used of old, and now, as before, the apt words cannot "be expressed by any other words or by any periphrases or circumlocution." And thirdly, the new phrases may be substituted

Sect. 3.

only for "heirs." "heirs of the body," and such like: they are not made equivalent to "successors." Accordingly, it would be unsafe in a conveyance to a corporation sole to rely upon this enactment, as the effect of granting land to a corporation sole "in fee simple" may be to vest the fee not in the corporation sole, but in the individual for the time being forming it. And lastly, it refers only to fees simple and fees tail, and fees tail male and female and not to fees in special tail. This, however, would probably be held to come within the words applicable to fees tail generally.

As the precedent shows, it is usual in conveyances on sale to insert after the word "unto" in the habendum the words "and to the use of" the grantee. In such conveyances they are superfluous, but in cases where no value is given they serve a useful purpose. Before the Statute of Uses, if, in a voluntary conveyance, the use was not expressly declared to be in the grantee, it resulted back to the grantor. Accordingly, after the Statute of Uses, if in a voluntary conveyance the use was not declared to be in the grantee, not merely the use but the legal estate also, resulted back to the grantor (see *supra*, p. 9), and the whole grant became a nullity. To prevent this it became necessary, in voluntary grants, where it was desired to vest the legal estate in the grantee (and it became customary also in grants for value) to insert the words "and to the use of." As we shall see, the presence or absence of these words, in case of settlements and wills, is often of great importance in deciding whether the limitations to the beneficiaries under the settlement are legal or equitable.

It may be added that the use of the words "and to the use of" do not prevent a resulting trust of the equitable estate in favour of the grantor where it appears that the grantee was intended to take the estate as a trustee, and



## PART II.—ASSURANCES BY WAY OF PURCHASE.

**Sect. 3.**      either no trusts are declared or those declared do not exhaust the whole interest conveyed.

Estates in  
expectancy.

Where the interest granted is not one in possession, but one in reversion or remainder, the usual mode of conveying it is, after setting out in the recitals the nature of the preceding estate, to convey it "subject to" such estate, but otherwise to convey as if it were an interest in possession. Sometimes, however, it is described as a reversion or remainder. It is to be remembered, in this connection, that no future interest of freehold tenure can be created by these words of direct limitation—"unto and to the use of the" grantee—except a reversion or remainder, that is, an estate which is to come into possession upon, and only upon, the regular determination of a preceding freehold interest. To limit a future freehold interest to come into possession from, say, the end of the current year, or even from the determination of a prior leasehold interest, would be to attempt to create a freehold estate *in futuro* by a common law limitation, and as at common law freehold estates could be limited only to commence at once or immediately upon the determination of a preceding freehold estate, the grant would be void (see *infra*, p. 129). Such freehold *in futuro* may be created, as we shall see, by means of limitations by way of use.

SECTION IV.

COVENANTS, ACKNOWLEDGMENT AND  
UNDERTAKING, AND EXECUTION.

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AFTER the habendum came the *covenants for title*. These Covenants  
now, as we have seen, are implied by the declaration in for title.  
the operative words of the character in which the grantor  
conveys. If express covenants for title are introduced  
now, they are usually inserted for the purpose of limiting  
the operation of the implied covenants (see *supra*, p. 68).

Express covenants for various purposes by the grantee, Covenants by  
however, are constantly inserted, especially when the grantee.  
interest granted is less than a fee, or is a fee but is in the  
nature of a lease (see *supra*, p. 25). And even in absolute  
grants of fees simple, covenants are not infrequently  
inserted when it is desired to restrict the use the grantee  
may make of the land granted. Thus, where a landowner  
is developing a building estate, it is customary to insert in  
the conveyance of each plot, covenants as to the kind of  
buildings which are to be erected on the land granted.  
These are usually mutual covenants, the purchaser under-  
taking with the vendor and his assigns to build houses  
only in accordance with the building scheme, and the  
vendor undertaking with the purchaser not to sell any



**Sect. 4.** other part of his land except subject to similar covenants on the part of the buyer. Where the landowner enters into covenants of this kind it is necessary they should be indorsed on one or more of his title deeds, as such covenants, even when negative merely, will not bind other purchasers of plots from him, who buy without notice of the covenant (see further, *infra*, p. 111).

Acknowledgment and undertaking.

The acknowledgment and undertaking as to the title deeds have taken the place of the former covenants for safe custody and production, since the commencement of the Conveyancing and Law of Property Act, 1881.

When title deeds may be retained by grantor.

At common law the title deeds were looked upon as part of the land, and on the conveyance of the land, unless the grantor warranted the title of the grantee (in which case he could retain them to prove the title warranted (Co. Litt. 6 a)), or unless they related to other lands belonging to the grantor besides those granted, or to an interest in the same lands retained by the grantor, the grantee was entitled to have them transferred to him along with the land. And this state of the law has been recognised by statute (s. 2, r. 5 of the Vendor and Purchaser Act, 1874), enacting that “where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.” “Estate” here means an interest in land, and the fact that the title deeds comprise the title to some interests in chattels merely retained by the vendor, will not, in the absence of a special stipulation to that effect, entitle him to retain the deeds if all the land comprised in them is sold (*Re Williams and Duchess of Newcastle*, [1897] 2 Ch. 144).

Covenants to preserve and produce title deeds.

When, then, a vendor retained the possession of the title deeds on the ground that he had not parted with all his interest in the land sold, or with all the land assured in the title deeds, it was customary for him to give covenants to

the purchaser to keep the title deeds safe, and to allow him and his heirs and assigns, to have inspection, and to take copies of them at any reasonable times thereafter. For these covenants are now substituted the statutory *acknowledgment and undertaking* set out in our precedent, and though these are less beneficial to the purchaser than the old covenants, they are now universally adopted. It is usual, too, when the vendor acts in a fiduciary capacity, for him to give merely an acknowledgment. It is extremely doubtful, however, whether in the absence of express stipulation on the point, a fiduciary vendor is entitled to refuse to give an undertaking for safe custody.

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The obligations arising from an acknowledgment and undertaking are set out in s. 9 of the Conveyancing and Law of Property Act, 1881. An acknowledgment imposes these obligations: (i.) "An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and (ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and (iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them" (s. 9 (4)). The obligations imposed by an undertaking, on the other hand, is as follows: "An undertaking in writing for safe custody . . . shall impose . . . an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident" (s. 9 (9)). For a breach

Obligations  
arising from

ledgment,

and from  
undertaking.

**Sect. 4.** of the acknowledgment no damages can be recovered (s. 9 (6)), but on the breach of the undertaking by the loss or destruction of the documents, the person entitled to the benefit of the obligation may apply to the court to have damages assessed for any injury thereby suffered by him (s. 9 (10)).

Operation of  
acknowledg-  
ment and  
undertaking.

A few points further may be noticed as to the effect of acknowledgments and undertakings within s. 9. In the first place, both apply only to documents the possession of which has been retained by the person giving the acknowledgment and undertaking. Accordingly, if at the time they were given the documents were not in his possession, or under his control, both acknowledgment and undertaking are practically useless. It is, therefore, of the highest importance to ascertain who—*i.e.*, for instance, whether the vendor or the mortgagee or the trustee (if any)—has the possession of the documents, and to insist on the acknowledgment and undertaking being given by him, or else on the vendor entering into the old covenants for title. In the next place, both acknowledgment and undertaking only bind the person giving them as long as the documents are in his possession. There is nothing to prevent him handing the documents over to some other person becoming rightfully entitled to them, and then even though no notice of the transfer be given to the person to whom the acknowledgment and undertaking were given, the obligations under these cease to bind him from the moment he parts with the possession of the documents. Thirdly, the obligations run with the possession of the documents, and the benefit of them runs with the interest of the person to whom the acknowledgment and undertaking were given (s. 9 (9)). Thus, if A. buys part of Whiteacre, obtaining an acknowledgment from his vendor, and A. afterwards sells to B., and the vendor afterwards mortgages the rest of Whiteacre to C., the vendor will be bound to transfer the title deeds to C., and B. will be entitled to production as against C., just as A.

Sect. 4.

originally was entitled as against the vendor. Again, although an acknowledgment and undertaking is sufficient to satisfy any condition in an agreement of sale that the vendor should covenant for production and safe custody (s. 9 (11)), yet the rights given by an acknowledgment or undertaking are additional to any other rights specifically reserved in the deed, and subject to any qualification introduced in the deed (s. 9 (12)). Lastly, as far as acknowledgments are concerned "all costs and expenses of or incidental to the specific performance of any obligation imposed . . . by an acknowledgment shall be paid by the person requesting performance" (s. 9 (5)) : subject to this, that if an application to the court becomes necessary in order to enforce the obligation, the costs are within the discretion of the court (s. 9 (7)).

An acknowledgment and undertaking need not be contained in the deed itself. They may be drawn up in a separate document, and such document need not be under seal. If not under seal it needs, at most, a sixpenny stamp. Formerly it was the practice, when the documents within the acknowledgment and undertaking included deeds anterior to the root of title, to make the acknowledgment and undertaking—or the equivalent covenants—by a separate instrument, in order to avoid, on a subsequent resale, requisitions as to and claims for the production of old deeds which might then be lost or mislaid, or which might disclose defects of title. This inconvenience was abolished by s. 3 (3) of the Conveyancing and Law of Property Act, 1881, which enacts that a vendee shall not require "any information, or make any requisition, objection, or inquiry, with respect to any . . . deed, will, or document, or the title prior to" the time fixed by law or agreed upon for the commencement of title, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed (see *Re Sandbach and Edmondson*, [1891] 1 Ch. 99). The ordinary practice now is to insert the acknowledgment

Acknowledgment and undertaking may be by separate instrument.

## PART II.—ASSURANCES BY WAY OF PURCHASE.

**Sect. 4.** and undertaking in the body of the deed, and put the documents of title bound by them in a schedule thereto, but sometimes when the documents are very numerous it is convenient to have the acknowledgment and undertaking in a separate writing.

Grantee need not execute deed.

Though grantor and grantee are invariably recited as parties to the conveyance, yet in practice the grantee does not and, as a rule, need not execute the deed (*Standing v. Bowring*, 31 Ch. D. 282), save where the deed contains reservations or exceptions (*Wickham v. Hawker*, 7 M. & W. 63, 76). All conditions and covenants are binding upon the grantee without his executing the conveyance if he consents to it by entering upon the land granted under the conveyance. "The cause is," in the words of Littleton (s. 374), "for that inasmuch as hee entred and agreed to have the lands by force of the indenture hee is bound to performe the conditions within the same indenture if hee will have the land." The expense of preparing the conveyance is borne by the vendee, but, if the vendor wishes to have a counterpart, the expense of preparing it must be paid for by him.

*Testimonium* clause.

As has already been said, the *testimonium* is not a necessary part of a deed, nor is it necessary that the grantor should sign the deed of grant, or, that his signature and delivery of it should be witnessed, save in certain cases of appointments, and perhaps where the grantor is illiterate, when it is required to show that the deed was read over to him. Though not necessary (save as stated), all these formalities are invariably strictly observed, and the absence of any of them would excite suspicion, and the presence of all of them is *primâ facie* evidence that the deed was properly executed (*In re Sandilands*, L. R. 6 C. P. 411). And the Legislature has to a certain extent recognised the practice by enacting that on a sale the vendee "shall

be entitled to have, at his own cost, the execution of a conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor" (s. 8, Conveyancing and Law of Property Act, 1881). Formerly the vendee could, where it was not unreasonable, insist on the vendor executing the conveyance before his solicitor (*Viney v. Chaplin*, 2 De G. & J. 468), but that right has been taken away, save to the extent above stated, as far as conveyances on sale are concerned. Section 8 does not extend to mortgages or to surrenders of copyhold.

If the vendor be a married woman and she is beneficially entitled to freeholds, she cannot where he and she were married before and her title to the freeholds accrued before January 1, 1883, convey either the legal or equitable interest in them without her husband joining in the conveyance, unless the freeholds were limited to trustees for her separate use, or were her separate property under the Married Women's Property Acts, 1870 and 1874 (Married Women's Property Act, 1882, ss. 2, 5). Where freeholds are vested in her as trustee, administratrix, or executrix, it seems that, no matter when the title may have accrued to her, or when she may have married, she cannot convey them without her husband joining (s. 18, *Re Harkness and Allsopp*, [1896] 2 Ch. 358). Whenever the husband must join in the conveyance the wife must be separately examined as to her consent to the conveyance (Fines and Recoveries Act, 1833, s. 79), and her deed will operate from the date of her acknowledgment of consent (Conveyancing Act, 1882, s. 7). Where, however, the married woman may convey without her husband's acquiescence there is no need of any separate acknowledgment, whether the property is her separate estate in equity (*Pride v. Bubb*, L. R. 7 Ch. 64), or her separate estate by virtue of the Married Women's Property Act, 1882.

Sometimes a deed of grant is executed, not by the

Execution  
of deed by  
married  
women.

Execution  
of deed by  
attorney.



**Sect. 4.** grantor himself, but by an attorney appointed by him. The appointment must be by deed, and a married woman can now so appoint an attorney to act for her (Conveyancing and Law of Property Act, 1881, s. 40). An attorney properly appointed can now execute the deed either in his own name or in the name of the grantor (*ibid.*, s. 46), but it is still customary and proper for the attorney to execute the deed in the grantor's name, in this mode, "P. C., by C. O., his attorney" (see *per* COTTON, L.J., in *In re Whitley Partners, Limited*, 32 Ch. D. 337, at p. 338).

Other forms  
of grant.

This, then, is the ordinary form of an indenture of grant of freeholds legal or equitable, by way of purchase. It may be varied more or less by the mode in which it is made or by the number and characters of the parties to it. Thus, it may be indorsed on another deed, or it may be made supplemental or as an annex to another deed. In such cases the purport of the other deed need not be recited, as the indorsed or supplemental deed will be construed as if the contents of the other deed were recited in it (Conveyancing and Law of Property Act, 1881, s. 53). Or the deed may take the form of an appointment under a power, in which case it may be made by deed poll. If made by deed poll, the deed commences, "Know all men by these presents" if there are recitals, and "To all to whom these presents shall come greeting" if there are none; and the date is at the end of the deed in the testimonium clause, "In witness whereof the said [*appointor*] has hereunto set his hand and seal this       day of       .” Or the deed may be in exercise of a power of sale which the grantor possesses as tenant for life under the Settled Land Acts, 1882 to 1890, or as mortgagee under the Conveyancing and Law of Property Act, 1881, or by express agreement, in which case the mode in which the power arises should be recited, and the grantor should be expressed to convey in exercise of the power. Or a mortgagee or annuitant may join

**Sect. 4.**  

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for the purpose of conveying the freehold discharged from incumbrances. Or the trustee of the legal estate may convey by the direction of the equitable owner. In all these and scores of other cases variations must be introduced, but a discussion of all, or indeed of any of them, would be outside the scope of this elementary work, and would tend only to confuse the mind of the beginner, for whose instruction it is intended. We shall therefore deal no further with assurances by way of purchase as far as freeholds are concerned, but shall in the same brief way consider assurance by way of purchase of leaseholds, including therein not merely assignments of leaseholds already in existence, but the grant of leaseholds *de novo*.



## SECTION V.

## INDENTURE OF LEASE.

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| <i>Rents charged on incorporeal</i>     |      | <i>Relief for under-lessees</i> - .     | 111  |
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**Title to lease.** AN indenture of lease follows practically on precisely the same lines as an indenture of grant. It commences with the date, and then states the parties. The name and addition of the lessor are almost invariably followed by "hereinafter called the lessor," and those of the lessee by "hereinafter called the lessee." As a rule, there is no recital of the lessor's title, just as, as a rule, there is no investigation of it before grant on behalf of the intending lessee. By s. 2 (1) of the Vendor and Purchaser Act, 1874, under a contract to grant a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee is not, in the absence of a

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special stipulation in the contract to the contrary, entitled to call for the title to the freehold. And by s. 13 (1) of the Conveyancing and Law of Property Act, 1881, under a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee is not, in the absence of a special stipulation in the contract to the contrary, entitled to call for the title to that reversion. Accordingly, on an open contract for the grant of a term when the grant is by a lease or sub-lease, the intended grantee cannot claim to inquire into the right of the freeholder to grant the lease, and when the grant is by sub-sub-lease, the intended grantee cannot claim to inquire into the right either of the freeholder or the head lessee to grant either the lease or the sub-lease. And this provision as to open contracts is in practice rarely varied by express stipulation, though when a fine is paid for the lease, or when a large expenditure is contemplated on the land leased—as in the case of a building lease—there seems no reason why any investigation of title desirable on a sale of the freehold should here be neglected. As Lord MANSFIELD says in *Keech v. Hall* (1 Doug. 21): “Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds.” Of course, if the rent reserved is a rack-rent (see *infra*, p. 100), then the lease is generally of so little value that it would be improvident to waste costs in seeking absolute security.

After the parties, then, in most leases, follow the witnessing clause and operative words. Where no fine is paid the clause words run “Witnesseth” (without being preceded by “now this Indenture” as in a grant of freehold) “that in consideration of the rent hereinafter reserved and of the lessee’s covenants hereinafter contained, the lessor hereby demises unto the lessee.” The word *demise* is the apt word for leasing. Formerly the usual phrase was “demise, grant, and to farm let,” but now the one word “demise” is invariably used. Any other word or words, however, making clear the intention to grant a lease would

Operative words.

**Sect. 5.** be equally effectual in passing a term (Co. Litt. 45 b). But “demise” is a word of art which implies an absolute covenant, on the lessor’s part, for title (unless this implication is excluded, as it usually is, by express covenants), besides a covenant for quiet enjoyment (*Line v. Stephens*, 5 Bing. N. C. 183), while any other words than “demise” merely imply a covenant for quiet enjoyment as long as the lessor’s title continues (*Baynes and Co. v. Lloyd and Sons*, [1895] 1 Q. B. 820), which indeed arises out of the mere relation of lessor and lessee (*Hall v. City of London Brewery Co.*, 2 B. & S. 737). The suggestion made in *Mostyn v. West Mostyn Coal and Iron Co.* (1 C. P. D. 145, at p. 152) that any words equivalent to “demise” would imply a covenant for title seems unfounded.

**Parcels.** After the operative words come the parcels, the licences, and all the reservations save that of the rent.

**Licences.** The parcels are similar to those in an indenture of grant save that, except in building leases, they are shorter and there is no map to assist in the delineation of the premises demised. The licences are short statements of privileges conferred upon the tenant outside those arising from the demise of the property. Thus, in an agricultural lease, if it is intended that the lessee shall have a right to commit voluntary waste, a licence to commit waste should be inserted. It is at least doubtful whether a tenant for years is liable for permissive waste (*Lord Castlemaine v. Lord Craven*, 22 Vin. Abr., and see *Re Cartwright*, 41 Ch. D. 532), but, to prevent difficulties, whether he is to be liable for it or not, it should always be made clear. As permissive waste consists not in doing anything, but in neglecting to do something, namely, keep in proper repair, no licence for it is necessary, and if it is to be forbidden, the provisions as to that are inserted among the covenants. In mining leases licences are given over the land in which the mines are situate for all purposes necessary for the proper carrying out of mining operations—such as licences to sink shafts, to build works,

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to use water, to make spoilbank, to work other mines through the mines demised (instroke), and the mines demised through other mines (outstroke), to let down the surface, etc., such licences to be used in such a way as to do as little damage as possible and reasonable compensation to be made for any damage done. It may be noted that by "minerals" are meant—when the meaning is not varied by the context—all substances in the earth which have "a use and a value of their own independent of and separable from the rest of the soil," and not, as is sometimes said, substances in the earth which have a marketable value (*Johnstone v. Crompton and Co.*, [1899] 2 Ch. 190).

After the reservation comes the habendum. With regard to the habendum in a lease as compared with the habendum in a grant of freehold two things are to be remembered. In the first place, no technical words are needed to mark out the extent of the interest granted. Sometimes the term is granted to the lessee "his executors administrators and assigns," but these words are altogether unnecessary. To create a good term of years all that is necessary is to name the lessee himself, and to set out with certainty when the term is to begin and to end; "for," as Lord COKE says, "regularly in every lease of yeares the term must have a certaine beginning and a certaine end" (Co. Litt. 45 b). But that is for this purpose regarded as certain, which is capable of being made certain before the determination of the term (*ibid.*). Thus a lease for twenty years from the date of payment of a certain fine, to be paid by the lessee to the lessor, has a sufficiently certain beginning since on payment it becomes certain (*ibid.*). And see *In re Lander and Bayley's Contract*, [1892] 3 Ch. 41. And a lease for as many years as A. shall name is capable of being made certain before the determination of the term, but a lease for as many years as A. shall live is not capable of being so made certain since the number of years A. shall live cannot be ascertained until A. is dead and the term is ended (*ibid.*). "And albeit (as

Habendum  
Technical words of limitation necessary.

**Sect. 5.** hath beene said) a lease for years must have a certaine beginning and a certaine end, yet the continuance thereof may be incertaine for the same may cease and revive againe in divers cases" (Co. Litt. 46 a). Thus, if A., B. and C. are life tenants in succession of Whiteacre, and A. and C. joint to grant D. a lease for twenty-one years, this lease will be good as long as A. lives, but on his death it will not be good as against B., who was no party to it. If, however, B. survives A. but dies before C., and before the expiration of the term of twenty-one years, the lease will revive for the remainder of the term as against C.; and D., if he had meanwhile been ejected from the land by B., can then re-enter.

Term may  
commence  
*in futuro*.

The second point to be remembered as to the habendum in a lease is that the term demised may be made to commence *in futuro* (see *supra*, p. 82). Both this characteristic and those already above referred to arose from the fact that originally leases for terms of years were regarded as conferring no property in the land. They were regarded simply as contracts between the lessor and lessee, and, like all contracts, they were not within the common law rules as to limitation of interests in land. They may accordingly be limited to commence at any future time quite independently of any subsisting interest, and they can also be limited to commence from a past date. In practice this latter is usually done when a lessee enters at some other period than the usual quarter day. Then the lease is limited to commence from the last quarter day, and the rent payable on the first quarter day is calculated as from the time he actually entered.

Reddendum

After the habendum comes the reddendum or reservation of the rent. That is usually expressed thus: "Yielding and paying during the said term the yearly rent of £ by four equal quarterly payments on the 25th day of March the 24th day of June the 29th day of September and the 25th day of December the first quarterly payment to be

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made" on such of these dates as first arrives after the grant of the lease, "and to consist of" either the whole quarter's rent or such proportion of it as corresponds to the portion of the quarter since the lease was granted, and the last quarter's rent is generally made payable at the beginning instead of the end of the last quarter. When rent is thus made payable in advance it becomes due at the beginning of the quarter, and can, if then unpaid, be immediately distrained for (*London and Westminster Loan Co. v. London and North Western Rail. Co.*, [1893] 2 Q. B. 49).

It may be noted that a rent-service cannot be reserved out of anything save corporeal hereditaments (a) by any person save the King. The reason for this distinction is that at common law distress upon the things demised always lay for a rent service, and distress could not be levied on incorporeal hereditaments. The King, however, can levy distress for a rent reserved, not merely on the thing demised but on any land belonging to the lessee (Co. Litt. 47 a, Butler's Note). This brings us to the distinction between rents-service, and other rents properly and improperly so called.

Rent properly so called reserved only on corporeal hereditaments.

A rent-service is a rent arising out of the relation of tenure (i.e., of landlord and tenant) and nowadays consists usually in a money payment. It is called a rent-service because it is paid in lieu of the ancient services which every tenant had to render his lord. For rent-service the common law always allowed, in the case of a lease for years, an action for debt and a remedy by distress—that is, it permitted the landlord, as the Statute of Marlebridge

Kinds of rents.

Rent-service

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(a) Exceptions : Rent-service could be reserved on a lease of the herbage or vesture of the land, and cattle grazing on the land taken by distress for the rent ; and on a remainder or reversion where distress could be levied after the remainder or reversion fell into possession (Co. Litt. 47 a ; 10 Edw. 4, c. 3).



**Sect. 5.** (52 Hen. 3, cc. 1—21) has it, to take “revenge” for arrears of rent due to him by entering upon the land and seizing any goods or chattels upon it, and holding them as security for such arrears. As to the goods privileged from distress, see *Simpson v. Hartopp*, 1 Sm. L. C. It was not till 1689 A.D. that the landlord was permitted to sell such goods to realize his rent (2 Will. & M., sess. 1, c. 5).

When a rent was reserved upon a freehold granted, this was a rent-service, but apparently distress was the only common law remedy for its recovery, an action for debt—which was, as has been said, the other common law mode of recovering arrears of rent on a lease for years—not being applicable (*b*) (3 Bla. Com. 232) : An action for debt now lies under 8 Anne, c. 14, s. 4. Such a rent was originally a rent-service, whether the freehold granted under the lease was a fee simple or smaller estate. But after the passing of the statute *Quia Emptores* (*supra*, p. 21) it became impossible to create the relation of lord and tenant between the grantor and grantee of a fee simple. Accordingly, any rent henceforth reserved on such a grant was no longer a rent-service. It was called a *rent-seck*, or dry rent, because the common law gave no remedy for its recovery. If, however, a right to levy distress was expressly given in the deed reserving the rent, then the rent was called a *rent-charge*—that is, a rent charged on the land. Ultimately the remedy by distress was extended by statute (4 Geo. 2, c. 28, s. 5) to all rents reserved on land, and

Rent-seck.

Rent charge.

(*b*) The reason for this distinction seems to be that when rent was reserved on a lease for years the obligation was regarded—as the whole transaction was—as matter of contract, and, therefore, the appropriate subject-matter of an action of contract, while, as the rent issued out of the land, the ancient remedy by distress was also permitted. When the lease was of a freehold interest the obligation—even though expressly reserved in the charter of feoffment—was regarded as merely an incident of the freehold estate, and, therefore, not appropriate subject-matter for an action based on contract.

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now by s. 44 of the Conveyancing and Law of Property Act, 1881, the person entitled to an annual sum charged on the land or payable out of the income of the land, whether, strictly speaking, a rentcharge or not, is entitled (unless a contrary intention appears in the instrument creating the charge), (1) if the annual sum, or any part of it, is unpaid for twenty-one days next after the time appointed for payment to distrain ; (2) if it is unpaid for forty days, to take possession of and hold the land and take the income until the arrears are paid, and while in possession he shall not be impeachable for waste ; or (3) if it is unpaid for a like period he can, by deed, demise the land to a trustee, who may by mortgage, sale or demise, or other reasonable means, raise and pay the annual sum and all arrears and costs.

Rents reserved on grants in fee simple before the statute *Quit-rents.*  
*Quia Emptores* still exist. They are not called *quit* or *chief-rents*, and are usually of small money value. They and rent-charges (except rent-charges reserved on sales or leases or building licences or other annual sums issuing out of land and not perpetual) may now, at the option of the owner of the land, be redeemed at a valuation made by the Board of Agriculture (Conveyancing and Law of Property Act, 1881, s. 45).

When annual sums, called rents, are reserved out of incorporeal hereditaments, these are, as a rule, merely matters of contract between the owner of the incorporeal hereditament and his lessee, and they will not pass with the reversion of the incorporeal hereditament, nor on the owner's death intestate, go to his heir (Co. Litt. 47 a). But if the incorporeal hereditament on which the rent is reserved be granted out of a corporeal hereditament, the rent reserved will be regarded as incident to the corporeal hereditament, and will pass with it to the purchaser of the corporeal hereditament, or to the heir of the owner of it

Rents  
charged on  
incorporeal  
heredita-  
ments.



**Sect. 5.** (*Lord Hastings v. North Eastern Rail. Co.*, [1898] 2 Ch. 674 ; C. A., [1899] 1 Ch. 656). Thus, if a landowner demise a right of way over his land at a rent, the rent is incident to his land, just as much as if the lease were not of the way merely, but of the land itself (*ibid.*).

Names  
applied to  
rents.

Rent, whether so called properly or improperly, is described by various names according to the thing it is paid for, or the mode in which it is calculated. Thus, it is called a ground rent when it represents merely the value of the ground, exclusive of the buildings and improvements on the ground, and a rack value when it represents the whole value of land and buildings and improvements. Again, it is called a penal rent when it represents more than the whole value and is conditionally reserved as a mode of preventing breaches of covenant by the lessee. Again, in mining leases it is called a dead rent when it is a rent which the lessee must pay, whether he works the mines or not, and a royalty when it is paid per ton on the amount of minerals worked, and an acreage or footage rent when it is paid per acre per foot thick of the minerals worked. Usually, there are both a dead rent and a royalty or acreage rent reserved on a mining lease, with a clause that no royalty shall be paid unless more tons of minerals are taken than at the royalty fixed would cover the dead rent. In such cases, the dead rent is intended to restrain the lessee from rendering the mines unprofitable to the lessor by ceasing to work the minerals when he thinks proper, and the royalty or acreage rent is reserved to secure the lessor an increased rent when more minerals are raised than at a proper royalty would cover the dead rent.\* Usually, when the two rents are reserved, there is also an average clause, providing that where in one year the royalties on the minerals raised are less than the dead rent, no royalties in subsequent years will be payable where they exceed the dead rent, until they make up the former deficiency.

Formerly, there was a notion that when a freeholder granted a lease he must reserve the rent to himself and his heirs : if he reserved it merely to himself, or merely to himself and his assigns, it was thought that on his death during the term, the rent would determine (Co. Litt. 47 a). This view is probably incorrect, as it has been held that if it is reserved to the lessor “ during the said term ”—as it now always is—that is sufficient to carry the rent to the heir or devisee of the fee on the lessor’s death (*Sacheverell v. Frogatt*, 2 Saund. 367). And it always was clear law that if the rent be reserved generally, as it now always is, it will not determine on the lessor’s death (Co. Litt. 47 a).

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**Reservation of rent.**

After the reddendum come the lessee’s covenants. These are divided into two classes : first, usual covenants or covenants which the lessor is entitled to have inserted, unless he and the lessee have agreed to omit them ; and, secondly, covenants not usual, which the lessor is not entitled to have inserted unless he and the lessee have agreed to insert them.

**Lessee’s covenants.**

What are “ usual ” covenants in any particular kind of lease seems to depend on what is the general practice of conveyancers in drafting leases of that description, and they may vary from time to time if that practice varies (*per* JESSEL, M.R., in *Hampshire v. Wickens*, 7 Ch. D. 555), subject to this limitation, that whatever may be the practice of conveyancers, the court will not hold any covenant to be “ usual ” in the sense here stated, which in any way diminishes the estate which the grantee was to receive (*per* JAMES, L.J., in *Hodgkinson v. Crowe*, L. R. 10 Ch. 622, at p. 624, and see *Re Lander and Bayley’s Contract*, [1892] 3 Ch. 41).

**“ Usual ” covenants.**

In ordinary leases, usual covenants seem to include at present :

(a.) A covenant to pay the rent reserved in the lease ;

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(b.) A covenant to pay rates and taxes upon the property demised, with the exception of landlord's property tax, and in the case of agricultural leases, the tithe rentcharge.

(c.) A covenant to keep and deliver up the premises in repair.

(d.) A covenant giving the lessor a right to enter at intervals upon the premises for the purpose of inspecting their state of repair.

Form of  
"usual"  
covenants.

These covenants, when unmodified by express agreement, are usually expressed as follows :

"And the lessee hereby covenants with the lessor in manner following that is to say That the lessee will pay the rent hereby reserved at the time and in the manner aforesaid and will also pay all rates taxes duties and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or the owner in respect of the said premises (except the landlord's property tax) and will at the expiration or sooner determination of the said term deliver up the premises together with all landlord's fixtures now or at any time hereafter affixed to the said premises in as good condition as they are now And also will permit the lessor or his agent or agents with workmen and others twice or oftener in every year during the said term to enter upon the said premises to view the condition thereof."

Why express  
covenants are  
desirable.

The first three of these covenants relate to duties on the part of the lessee, which would be to a great extent imposed upon him without express covenants by the mere acceptance of the lease. These covenants are inserted, however, for two reasons. In the first place, they give greater definiteness to the obligations arising under the lease. In the second place, they bind the lessee personally during the

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continuance of the term, even though he has assigned the lease to some one else. When an original lessee assigns his lease, the assignee becomes liable to the lessor on these covenants, but that does not relieve the original lessee, who having expressly agreed to do certain things during the continuance of the term, is liable upon his undertaking to do them, whether he still holds the land demised or not. The same considerations apply to express covenants by the lessor (see *infra*, p. 111), and, accordingly, we shall find parties to conveyances, mortgages and settlements, constantly covenanting to discharge duties which the law, without any covenant, imposes upon them.

First, as to the covenant to pay the rent. As a general rule, any debt arising under a contract by deed is recoverable by the person to whom it is payable, at any time within twenty years after the right to payment accrues, or after the last payment made in respect of the debt, or the last acknowledgment in writing by the debtor. This rule, however, does not apply to rent due under a covenant, though a covenant is a contract under seal. The period in regard to it is, as to establishing the right to the rent itself—that is, the right of claiming payment of it in the future—limited to twelve years (Real Property Limitation Act, 1874); while as to unpaid arrears of the rent, it is limited to six years (Real Property Limitation Act, 1833, s. 42). These enactments apply to remedies for rent, both by distress and action.

Secondly, as to the covenant to pay rates and taxes, this covenant may vary greatly as to the charges and assessments included in it. Where the term demised is a long one and the rent reserved is merely a ground rent, it is customary to draft it in terms which will include not only ordinary annually recurring rates and taxes, but also every possible assessment or imposition made by lawful authority upon the premises, or on the lessor as owner of the premises in respect of them, during the term. The covenant

**Sect. 5.** given above is so drafted. Where, however, the term is a short one or the rent reserved is a rack-rent, the covenant is usually drawn so as to make the tenant liable only for what are ordinary annually recurring rates and taxes (*per* CHANNELL, J., in *Baylis v. Jiggins*, 79 L. T. 78, at p. 80).

Owing to the great growth of charges not properly rates or taxes—such as charges for paving and sewerage streets and sanitary works—some of which are imposed upon the owner and not on the tenant, while others are made a statutory charge upon the premises, many disputes have arisen over the construction of this covenant. To prevent these it is necessary that the covenant should be very carefully drafted. If it is intended to cover all charges during the term, and so to leave to the lessor the whole rent reserved clear and certain, subject only to the deduction of the property tax, which by law must be paid by the landlord, it is necessary to draft the covenant so as to apply not merely to “rates, taxes, and assessments,” but also to “charges, duties, and other outgoings” (*Budd v. Marshall*, 5 C. P. D. 481; *Aldridge v. Ferne*, 17 Q. B. D. 212), and to extend it not merely to such of these as are imposed “upon the premises,” but also to those which are “imposed on the owner in respect of the premises” (*Wilkinson v. Collyer*, 13 Q. B. D. 1). If the former words are used the latter are not absolutely necessary (*Lapworth v. Thompson*, L. R. 3 C. P. 149; *Brett v. Rogers*, [1897] 1 Q. B. 525). It is to be, however, remembered that the court inclines to read all such covenants as applying merely to ordinary rates and taxes and not to extraordinary charges, like paving expenses, sewerage, and other permanent improvements (*Wilkinson v. Collyer*, *supra*), more especially when the term granted is a short one (*Baylis v. Jiggins*, *supra*); and, therefore, when it is desired to include more than these, no precaution must be omitted to secure this object.

Thirdly, as to the covenant to keep and leave in repair, Sect. 5.  
it has been held that this covenant compels the lessee to Covenant to  
repair, or if necessary, rebuild after the injury or destruc- repair.  
tion of the demised premises by accidental fire (*Sharp v. Milligan*, 23 Beav. 419), or other inevitable event such as tempest or earthquake (*Prince Rupert's Case*, *Paradine v. Jane*, Aleyn, 26). And accordingly, it is usual to insert an exception in the covenant as to damage from fire, storm, or tempest. But, as even with this exception, the tenant remains liable for the rent while the premises are unfit for occupation after a fire (*Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507), a further clause is sometimes inserted for the purpose of relieving the lessee of obligation to pay the rent during such period. At the same time every covenant to repair is to be construed with reference to the condition of the buildings at the time of the demise. It is true that if the buildings were then out of repair, and the lessee covenanted to keep and render them back at the end of the term in good repair, he is bound first to put them, and then to keep them, in substantial repair (*Proudfoot v. Hart*, 25 Q. B. D. 42); but if the buildings were then, owing to some inherent defect unknown to the lessee, in such a state that during the continuance of the term they must, to keep them in repair, be substantially rebuilt, the covenant to keep in repair will not throw an obligation to rebuild upon the lessee (*Lister v. Lane*, [1893] 2 Q. B. 212). In the words of Lord ESHER, M.R., "If a tenant takes a house which is of such a kind that by its own inherent nature it will, in course of time, fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and



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Owing to the great growth of charges not properly rates or taxes—such as charges for paving and sewerage streets and sanitary works—some of which are imposed upon the owner and not on the tenant, while others are made a statutory charge upon the premises, many disputes have arisen over the construction of this covenant. To prevent these it is necessary that the covenant should be very carefully drafted. If it is intended to cover all charges during the term, and so to leave to the lessor the whole rent reserved clear and certain, subject only to the deduction of the property tax, which by law must be paid by the landlord, it is necessary to draft the covenant so as to apply not merely to “rates, taxes, and assessments,” but also to “charges, duties, and other outgoings” (*Budd v. Marshall*, 5 C. P. D. 481; *Aldridge v. Ferne*, 17 Q. B. D. 212), and to extend it not merely to such of these as are imposed “upon the premises,” but also to those which are “imposed on the owner in respect of the premises” (*Wilkinson v. Collyer*, 13 Q. B. D. 1). If the former words are used the latter are not absolutely necessary (*Lapworth v. Thompson*, L. R. 3 C. P. 149; *Brett v. Rogers*, [1897] 1 Q. B. 525). It is to be, however, remembered that the court inclines to read all such covenants as applying merely to ordinary rates and taxes and not to extraordinary charges, like paving expenses, sewerage, and other permanent improvements (*Wilkinson v. Collyer, supra*), more especially when the term granted is a short one (*Baylis v. Jiggins, supra*); and, therefore, when it is desired to include more than these, no precaution must be omitted to secure this object.

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Thirdly, as to the covenant to keep and leave in repair, it has been held that this covenant compels the lessee to repair, or if necessary, rebuild after the injury or destruction of the demised premises by accidental fire (*Sharp v. Milligan*, 23 Beav. 419), or other inevitable event such as tempest or earthquake (*Prince Rupert's Case*, *Paradine v. Jane*, Aleyn, 26). And accordingly, it is usual to insert an exception in the covenant as to damage from fire, storm, or tempest. But, as even with this exception, the tenant remains liable for the rent while the premises are unfit for occupation after a fire (*Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507), a further clause is sometimes inserted for the purpose of relieving the lessee of obligation to pay the rent during such period. At the same time every covenant to repair is to be construed with reference to the condition of the buildings at the time of the demise. It is true that if the buildings were then out of repair, and the lessee covenanted to keep and render them back at the end of the term in good repair, he is bound first to put them, and then to keep them, in substantial repair (*Proudfoot v. Hart*, 25 Q. B. D. 42); but if the buildings were then, owing to some inherent defect unknown to the lessee, in such a state that during the continuance of the term they must, to keep them in repair, be substantially rebuilt, the covenant to keep in repair will not throw an obligation to rebuild upon the lessee (*Lister v. Lane*, [1893] 2 Q. B. 212). In the words of Lord ESHER, M.R., "If a tenant takes a house which is of such a kind that by its own inherent nature it will, in course of time, fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and



**Sect. 5.** different thing, and moreover the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair” (*ibid.*, at p. 216).

**Covenant for inspection.**

The last of the usual covenants is the covenant permitting the lessor or his agents to enter and inspect the premises during the term. It is intended merely as a corollary to the covenant to repair.

**Modifications of the usual covenants.**

It seldom happens that a lease contains no other covenants than those which the law regards as “usual.” There are in nearly every demise where the letting is more than a letting from year to year, a number of covenants introduced by agreement between lessor and lessee; and the “usual” covenants are, in the same way, often greatly modified. The commonest of these are modifications in connection with the question of repairs, and the mode of using the demised premises.

Thus, in connection with repairs the covenant to deliver up in repair is not unfrequently modified by adding to it the exception, “reasonable wear and tear excepted.” The effect of this is practically to render the lessee liable merely for voluntary waste, for which he would be liable without the covenant. On the other hand, it is often strengthened by having the repairs which are to be done during the term specifically set out. Thus, in leases of dwelling-houses, it is very usual to covenant that the lessee shall once in every three years paint all the outside wood and iron work, and every seven years paint all the inside wood or iron work usually painted. In the same way there often is a covenant for the lessee to insure in a certain amount all the premises which might be destroyed by fire, and if they are so destroyed, to expend the policy money in rebuilding them within a given time. Again, in agricultural leases there are often covenants against voluntary waste of certain kinds—such as ploughing up

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meadowland—and covenants as to the course of farming to be followed, and the consumption of hay and straw on the premises. In leases of public houses there frequently are covenants not to do any act which would imperil the re-grant of the licence, and in future there will, no doubt, usually be a covenant not to surrender it (*Lacon v. Laceby*, [1897] W. N. 46 (3)).

In the same way what are known as “restrictive” covenants are commonly introduced in leases of all kinds. Thus, in building leases, where a large building estate is being developed, there are almost invariably covenants not to build houses of other than a given kind described in the lease ; in leases of better class dwelling-houses, covenants not to use the house as a shop, lodging house, or business place, and in leases of shops, not to carry on particular trades, etc., etc.

Restrictive covenants.

A covenant which is constantly inserted in leases of dwelling-houses, farms, public-houses, and other premises where the character of the tenant is a matter of importance in other respects than merely as a guaranty that the rent shall be paid, is a covenant against assignment without the licence of the lessor. It usually is expressed thus : “ And the lessee also covenants with the lessor that he will not, without the previous licence in writing of the lessor, assign, underlet, or part with the possession of the premises hereby demised, but such licence shall not be unreasonably or arbitrarily withheld to an assignment or subletting of the said premises to a respectable and responsible person.” Under such a covenant as this, before assigning or underletting, the lessee must apply for the lessor’s consent. If he assigns without so applying, then no matter how reasonable the assignment may have been, there is a breach of the covenant (*Barrow v. Isaacs*, [1891] 1 Q. B. 417). If, however, after applying for the consent it is unreasonably refused, then the lessee may assign without breach (*Treloar*

Covenant not to assign.

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v. *Bigge*, L. R. 9 Ex. 151). If, however, the covenant contains no qualification limiting the right of the lessor to refuse his licence, no assignment is good without it (*ibid.*). It may be doubted whether the last words of the covenant as above given (“to a respectable and responsible person”) serve any useful purpose. If the person to whom the intended assignment was to be made was not respectable and responsible it certainly could not be contended that the refusal of the lessor to consent to the assignment of the lease to him was arbitrary or unreasonable. On the other hand, the presence of the words suggests that in every case where the person is respectable and responsible a refusal to consent to an assignment to him must be unreasonable. This, however, is wrong. There may be, and not infrequently there are, other grounds than the want of respectability or responsibility which would make such a refusal far from unreasonable (see *Harrison v. The Corporation of Barrow-in-Furness*, 63 L. T. 834).

Where the consent of the lessor is required it is the duty of the assignor of the lease to procure it. If he refuses or wilfully neglects to do so he will render himself liable to an action for damages at the suit of the intended assignee. Such damages will not be limited merely to return of the deposit and expenses (as is the case where the vendor of property fails through no fault of his own to make title (*Bain v. Fothergill*, L. R. 7 H. L. 158), but will include all loss the intended assignee sustained by the failure of the assignor to obtain consent (*Day v. Singleton*, [1899] 2 Ch. 320).

By s. 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), in the case of such a covenant as this, unless there is an expressed provision to the contrary, the lessor is not to be entitled to any fine or payment for giving his consent; but this does not forbid his claiming payment of any legal or other expense incurred in relation to such licence or consent.

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It may be added that a covenant such as is given above is not broken by the lease being taken in execution or vesting the lessee's trustee in bankruptcy, and accordingly the covenant is sometimes so worded as to cause forfeiture on either of these events.

Usually, all the covenants of the lessee are enforced by a general proviso for re-entry by the lessor on the land demised on breach of any one of them. This proviso comes after the lessee's covenants, and usually runs as follows :

“ Provided always and it is hereby declared and agreed that if the said yearly rent of £      or any part thereof shall be in arrear for the space of twenty-one days next after any of the days whereon the same ought to be paid as aforesaid whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in his former estate.”

As has been said, this general proviso of re-entry is commonly inserted in leases. But it is not a proviso which a lessor on an open contract is entitled to have inserted. All such a lessor is entitled to is a proviso extending merely to default in the payment of rent (*Hodgkinson v. Crowe*, L. R. 10 Ch. App. 622). But this general proviso of re-entry being now not so objectionable as it was before the Courts obtained their present large powers of giving relief, is not very often objected to by lessees, though sometimes even now it may work great injustice by depriving a lessee of a valuable property merely because of an inadvertent omission to ask for a licence to assign where, had such licence been asked for, it could not have been refused (see *Barrow v. Isaacs*, [1891] 1 Q.B. 417).

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Proviso for  
forfeiture in  
breach of  
covenant.

“ Provided always and it is hereby declared and agreed that if the said yearly rent of £      or any part thereof shall be in arrear for the space of twenty-one days next after any of the days whereon the same ought to be paid as aforesaid whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in his former estate.”

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General  
proviso of  
forfeiture not  
a “usual”  
proviso.



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 Relief  
 against  
 forfeiture.

The law as to relief against forfeiture is now contained, as far as forfeiture for non-payment of rent is concerned, in s. 210 and 212 of the Common Law Procedure Act, 1852, and as to forfeiture for the breach of other covenants is concerned, in s. 14 of the Conveyancing and Law of Property Act, 1881, and ss. 2 and 4 of the Conveyancing and Law of Property Act, 1892.

As far as forfeiture for non-payment of rent is concerned, by s. 212 of the Common Law Procedure Act, 1852, a tenant against whom an action of ejectment is pending for non-payment of rent may put an end to all proceedings in such action by paying all arrears of rent and all costs, and by s. 210 he is to be relieved if within six months after judgment in such an action he pays all arrears of rent, costs, and damages suffered by the landlord through his default.

As to forfeiture for breach of any other covenant, s. 14 of the Conveyancing and Law of Property Act, 1881, provides that a right of forfeiture shall not be enforceable by action or otherwise unless and until the landlord has served a notice on the tenant requiring the breach to be remedied, if capable of remedy, and in any case for compensation in money, and the lessee fails within a reasonable time to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach (sub-s. (1)). This makes the issue of this notice a condition precedent to action, but even if notice be served and on the tenant's failure to obey the notice, action duly brought, yet at trial the court may still grant relief on such terms as it may think just (sub-s. (6)). But if relief be not sought and obtained then and judgment for possession be given for the lessor, the lessee cannot afterwards apply for relief (*Rogers v. Rice*, [1892] 2 Ch. 170).



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Section 14 applies to leases made before as well as after the passing of the Act (sub-s. (9)), but it does not apply to covenants against assignments subletting or conditions of forfeiture on the bankruptcy of the lessee, or the taking of the lease in execution, or in the case of mining leases, to conditions to permit the lessor to inspect books, weighing machines, etc., and the mine or workings (sub-s. (6)). As regards, however, conditions of forfeiture on bankruptcy or seizure in execution, further provision is made by s. 2 of the Conveyancing and Law of Property Act, 1892, by which it is provided that forfeiture under such conditions shall not take place till one year after the bankruptcy or execution, and shall take place then only if the lease has not been sold (sub-s. (2)), but this enactment is not to apply to leases of (a) agricultural or pastoral land, (b) mines or minerals, (c) public-houses or beer-shops, (d) furnished houses, (e) any other property where the personal qualification of the tenant is of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under him (sub-s. (3)).

No relief as to covenants not to assign

Forfeiture on bankruptcy or execution.

The Conveyancing and Law of Property Act, 1892, further extends the provisions as to relief against forfeiture to under-lessees of lessees who have committed breach of covenant (s. 5). And under these provisions under-lessees may sometimes obtain relief where the lessee himself could not (*Imray v. Oakshette*, [1897] 2 Q. B. 218).

Relief for under-lessees.

After the lessee's covenants follow the covenants on the part of the lessor. These seldom are numerous, except where the property demised is building ground or a flat, or other property where special circumstances impose special obligations on the lessor. In building leases the most usual covenants on the lessor's part are covenants inserted to secure the due carrying out of the building scheme, subject to which the building ground is demised. These consist

Lessor's covenants

**Sect. 5.** usually in covenants binding the lessor not to demise any of the adjoining land included in the scheme, except subject to covenants similar to those entered into by the lessee. Such covenants are useful to prevent disputes, but if the lessee entered into the covenants in his lease on the understanding that the scheme was to be carried out, the landlord would be bound not to change or abandon it without any express covenant to that effect (*Davis v. Leicester Corporation*, [1894] 2 Ch. 208), unless the stipulations in the building scheme were simply to build a certain character of houses without any provisions to ensure their maintenance in that character, when no restrictive covenants on the lessor's part will be implied by the court (*Holford v. Urban District Council*, [1898] 2 Ch. 240). There are frequently also, in building leases, covenants by the lessor restricting the nature of the trades that may be carried on on the adjoining land belonging to him.

Covenant for  
quiet enjoy-  
ment.

After these covenants come the covenant for quiet enjoyment. As has already been said (*supra*, p. 93), the word "demise," which is now used as the apt word for granting a lease, itself implies not merely a covenant for quiet enjoyment, but also an absolute covenant for title. Both of these covenants, however, are at once so wide and so narrow that they are satisfactory neither to the lessor nor the lessee. Accordingly, it is now the invariable practice to insert an express covenant for quiet enjoyment. This usually is something in this form :

"And the lessor hereby covenants with the lessee that the lessee paying the rent hereby reserved and performing and observing the covenants and conditions herein contained and on his part to be performed and observed shall and may peaceably and quietly possess and enjoy the said premises hereby demised during the said term without any lawful interruption from or by the lessor or any person rightfully claiming from or under him."

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This covenant, unlike an implied covenant, is qualified—not absolute (see *supra*, p. 68). On the principle that what is express excludes what is implied, the insertion of it excludes the covenant the law would otherwise imply from the use of the word “demise.” Where no express covenant is inserted—as where the lessor is a mortgagee or trustee only of the property demised and declines to take any liability under such a covenant—it is usual, in order to exclude the covenants implied by the word “demise” to insert after that word “by way of assurance only, and not of covenant or warranty.” As between an ordinary lessor and lessee, the express covenant for quiet enjoyment is a usual covenant, and so either party can insist on its insertion upon an open contract for a lease ; but it is doubtful whether the lessee can call for its insertion where the lessor is a trustee or mortgagee (see *Worley v. Frampton*, 5 Hare, 560).

Usually the only matters inserted after the lessor’s covenant for quiet enjoyment are (1) a condition enabling the tenant to determine the lease at some time or times before the expiration of the whole term for which it is granted ; (2) a covenant on the lessor’s part for renewal on the lessee giving a certain period’s notice of his desire to renew before the end of the term ; (3) a definition clause as to the meanings of the terms “lessor” and “lessee” throughout the lease. All these, of course, do not occur in every lease, and when they do occur, the first two of them not infrequently are placed before the covenant for quiet enjoyment.

Matters following covenant for quiet enjoyment.

The first of these provisoes or conditions usually occurs in leases of dwelling-houses for terms of twenty-one years. It runs much in this way :

Conditions as to determining lease.

“ Provided always and it is hereby agreed and declared that if the lessee shall be desirous of determining the

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—

said term hereby granted at the end of the first seven or fourteen years thereof and of such desire shall give to the lessor by leaving at his usual or last known place of abode in England notice in writing six calendar months next before the expiration of such seven or fourteen years and shall pay the rent hereby reserved and perform and observe all and singular the covenants by the lessee herein contained up to the expiration of such seven or fourteen years then and in such case at the end of such seven or fourteen years respectively the term hereby granted shall absolutely determine."

In order that a notice may be effectual to determine a lease under such a proviso it must amount to an absolute and unambiguous statement that the lessee desires to determine the lease. At one time it was apparently thought that however clear the intention to determine was, if the intention was stated as merely an alternative to the obtaining of some concession by the lessee, the notice would be insufficient (see *per* Lord MANSFIELD, C.J., in *Doe v. Jackson*, Dougl. 175). This can hardly be said to be the law now. If there is a clear intention expressed to determine the lease with an intimation that that intention will be changed if certain requests are granted, this alternative suggestion will not render the notice insufficient (*Bury v. Thompson*, [1895] 2 Q. B. 696).

Covenant to  
renew.

Covenants for renewal occur now most commonly in leases granted by copyholders. The general custom as to copyholds is that a copyholder cannot, without the consent of the lord of the manor, grant a lease for more than a year. This custom is modified in some manors by a special custom that enables copyholders to lease for twenty-one years; but, generally speaking, leases for this period are the longest which can be granted even with the lord's licence. But while leases for a year without, and for twenty-one years with, the lord's licence are the largest which can be granted without causing forfeiture

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of the copyholder's interest, yet there is no objection to a lease for one of these terms containing a covenant for renewal subject or not, as the case may require, to the grant of the lord's licence. These covenants for renewal are always made subject to the condition attached to the lessee's right to determine—namely, that before the right to renew arises, all the rent shall be paid and all the covenants and conditions in the lease performed and observed.

Leases for lives renewable were once pretty common, but they are now seldom met with, except sometimes in connection with ecclesiastical or corporate property.

The third of the matters mentioned as following the covenant for quiet enjoyment is the clause to interpret the expressions "lessor" and "lessee." It usually runs thus:

Interpreta-  
tion clause

"And it is hereby declared that where the context allows the expressions 'the lessor' and 'the lessee' used in these presents include respectively besides the aforesaid and the aforesaid their respective heirs executors administrators and assigns."

The object of this clause is to prevent the necessity—if any such necessity exists—of repeating over and over again in connection with each covenant that the lessee covenants for "himself, his executors, administrators and assigns," and that the lessor covenants for "himself, his heirs and assigns." The necessity for these words is not very clear in many cases, as, of course, a covenant always binds the covenantor's executors and administrators, and usually also his heirs and assigns. However, in order to ensure that the covenants referring to things which are not *in esse* on the land at the date of the lease, but which, when they come *in esse*, will be on the land, shall run with

**Sect. 5.** — the land—that is, bind not merely the lessee but his assigns—it is necessary that the lessee should expressly covenant for himself and his assigns (*Spencer's Case*, 5 Rep. 16 ; 1 Sm. L. C. 72). To prevent oversight in such cases it is well to have a general clause such as that above given.

Sometimes this clause is put not at the end of the lease but at the beginning. This, perhaps, is the best practice. Then it is put in the parties in this way :

‘            of, etc. (hereinafter called the lessor which expression shall include his heirs and assigns) of the one part and            (hereinafter called the lessee which expression shall include his executors administrators and assigns where the context so admits) of the other part.’

Testimonium  
clause.

After the interpretation clause—if it is not put in the parties—comes the *testimonium* clause, which is identical with that used in the case of grants of freehold (*supra*, p. 88).

Execution  
in duplicate

It is the usual practice to execute leases in duplicate, the lessor executing the original which is delivered to the lessee, and the lessee the counterpart which is delivered to the lessor. When this is done the cost of preparing the original is borne by the lessee and the cost of preparing the counterpart by the lessor, but both are prepared by the lessor's solicitors. The question of costs is, however, largely ruled by local custom.

## SECTION VI.

## ASSIGNMENT OF LEASES.

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| <i>Covenants by assignee</i>     | - 118 | <i>perty in lease is not assigned</i> | 119 |
| <i>Covenant to indemnify as-</i> |       | <i>Assignments are within s. 7</i>    |     |
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ASSIGNMENTS of leases may be dealt with very briefly. <sup>Form of assignment.</sup> As far as the form is concerned they differ markedly from deeds of grant and leases in one respect only. The parcels are usually put not in the operative part but in the recitals. The lease intended to be assigned is recited, and in the recital the parcels comprised in it are fully set out as they appear in the lease itself. These recitals usually run in this way :

“ WHEREAS by an indenture of lease dated                      and made between                      ALL those messuages or dwelling-houses situate, etc. [*parcels*] with their appurtenances were demised unto the said [*lessee*] or his predecessors in title his executors administrators and assigns from the                      day of                      for the term of                      years subject to the payment of the rent thereby reserved and the performance and observance of the covenants by the lessee and the conditions therein contained.”

Then, if the original lessee is not the assignor, the devolution of the lease to the assignor is traced. This is often done very shortly indeed as—

“ AND WHEREAS by virtue of divers mesne assurances acts in the law and events and ultimately by an indenture dated                      and made between                      on the one part and [*assignor*] on the other part the premises comprised in the said indenture of lease have become absolutely vested in



Sect. 6. the said [*assignor*] for all the residue of the said term of years subject to the rent reserved by and covenants and conditions contained in the said lease."

Then follows a recital of the agreement to assign as in a purchase deed, and the consideration. If no money consideration is given for the lease—as when it is held at a rack-rent—the consideration is stated to be "in consideration of the covenants by the [*assignee*] hereinafter contained."

Henceforth the instrument runs like an ordinary grant of freeholds. The character in which the assignor conveys—whether as "beneficial owner" or as "trustee" or as "mortgagee," or as "personal representatives"—is duly set forth, the parcels are set out by reference to the recital—"the messuages or dwelling-houses comprised in and demised by the said recited indenture of lease"—the *habendum* follows, and then come the covenants and conditions and *testimonium* clause.

Covenants by  
assignee.

Where the premises assigned are all those contained in the original lease, usually the only covenant entered into by the assignee is one to indemnify the assignor against liability under the covenant and conditions in the lease. This runs in this way :

"And the said [*assignee*] hereby covenants with the [*assignor*] that the said [*assignee*] his executors administrators or assigns will henceforth during the continuance of the said term pay the rent reserved by and perform and observe the covenants and conditions contained in the said lease and will at all times keep the said [*assignor*] his executors administrators and assigns effectually indemnified against all actions and proceedings expenses claims demands and liability whatsoever by reason of the non-payment of the said rent or any part thereof or the breach non-performance or non-observance of the said covenants or conditions or any of them."

This covenant is a "usual" covenant in an assignment in every case where the assignor remains after assignment under any liability under the covenants or conditions of the lease (1 Dart, V. & P. 629). He will remain liable on the covenants and conditions contained in the lease during the whole continuance of the term if he is the original lessee, no matter how often the term may be assigned. If he is an assignee himself, his liability under the lease ceases on his assignment of it ; but he will still be entitled to have, this covenant of indemnity inserted where he himself gave any such covenant to the assignor when he acquired the lease. It would seem that without the covenant, every assignor, whether original or mesne, is entitled to be indemnified by his immediate assignee for any damage he may suffer through a failure to pay rent or a breach of covenant after the assignment, whether such damage arose from the act or default of the immediate assignee or of some subsequent assignee (*Moule v. Garrett*, L. R. 7 Ex. 101). In this way, if the original lessee is held liable on his covenants, he can obtain indemnity from his immediate assignee, that assignee from his assignee, and so on, till the assignee through whose act or default the damage arose is made liable. This circle, however, may become broken through the bankruptcy or disappearance of an intermediate link. In such cases, if there is inserted a covenant to indemnify—as there always should be in each assignment—it may sometimes prove very useful (see *In re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182).

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Covenant to indemnify assignor a "usual" covenant.

The covenant given above, applies only to assignments where the whole property comprised in the original lease is assigned. Where part only is assigned, if the part is small, the assignment is made by way of under-lease for the full residue of the term, less a day ; if the part is substantial, by ordinary assignment. In the case of the under-lease, it is the under-lessor who covenants to pay the

Covenant where v property in lease assignee

**Sect. 6.** rent and perform the covenants of the head lease, while, of course, the under-lessee covenants to pay the rent and perform the covenants in the under-lease. These latter usually correspond to the covenants in the head lease, as far as those relate to the part of the premises assigned. In the case of the assignment of part of the premises, the assignor and assignee covenant mutually to pay their share of the rent reserved by, and to perform the covenants contained in, the head lease, as far as these relate to the parts of the premises retained and assigned respectively, and each gives the other a power of distress over his part of the premises in case he causes the other damage by breach of this covenant.

Assignments  
are within  
s. 7 of  
Conveyancing  
Act.

As far as the law relating to assignments of leases is concerned, the chief difference between an assignment of a lease and the grant of a lease *de novo*, is that the latter is not, while the former is, a conveyance within s. 7 of the Conveyancing Act. Accordingly, by the use of the words as “beneficial owner,” as “trustee,” etc., the covenants implied under similar circumstances in conveyances of pure realty will be implied in assignments of leaseholds (*supra*, p. 70), with the addition where the assignor conveys for valuable consideration and as a beneficial owner, of a covenant for the validity of the lease assigned (s. 7 (B)). This covenant, like all those implied by the Conveyancing Act, is confined to the acts and omissions of the assignor and those from whom he derives title otherwise than by purchase for value, and purchase for value here does not include a conveyance in consideration of marriage.

## PART III.

### ASSURANCES BY WAY OF SETTLEMENT.

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## SECTION I.

## RULES OF LIMITATION.

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A SETTLEMENT is, as has already been pointed out (supra, p. 50), an assurance of an estate or interest in land among different persons by way of succession (see s. 2 (1) Settled Land Act, 1882). According to this definition some dealings with property which are popularly called settlements, such as a conveyance of land to trustees in trust for a married woman for life for her separate use, and then to such objects in fee as she shall by deed or will appoint and in default of appointment to her right heirs, would not be settlements

What is a  
"settle-  
ment."

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(at any rate, within the Settled Land Acts), because the estate is vested in trustees, not in trust for different persons taking in succession, but in trust for one person taking different interests in succession (*In re Pocock and Prankerd's Contract*, [1896] 1 Ch. 302), though in such a case the married woman might have the same powers as a tenant for life under the Settled Land Acts, 1882 to 1890, by virtue of s. 58 (1) (ix.) of the Act of 1882 (*ibid.*).

Interests in  
expectancy

Where property is assured among different persons in succession it is clear that all the persons taking interests under the assurance, save the one who takes the first interest, must, in the nature of things, take interests in expectancy. Accordingly, in order to draft a settlement of realty, or even to understand such an instrument, we must know something of the rules relating to the limitation of estates in expectancy. These rules were once, and are to a great extent still, “the heart strings” of conveyancing, as Lord COKE says the rules of pleading are of the common law (see preface to *Co. Litt.*). The Legislature has in recent years done much, not to simplify them, but, by modifying their operation, to dispense with the necessity of many ingenious devices for preventing the defeat, either by the act of persons taking interests in possession or by the operation of the law itself, of the estates limited under them.

Rules of  
limitation  
of such  
interests.

History of  
such rules.

The rules of limitation, as they now exist, are incomprehensible without a knowledge of their history. That history may shortly be divided into three stages. The first stage is the period when both the legal and the equitable estate in land was subject strictly to the old common law rules of limitation; the second, when the equitable estate could be separated from the legal estate and while the old common law rules of limitation applied strictly to the legal estate, the equitable estate could be limited according to the equitable rules of limitation; the third, when both the legal and equitable estate could,



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subject to certain qualifications, be limited according to the equitable rules of limitation. Recent legislation might even be said to have created a fourth stage by abolishing the qualifications referred to, though this would perhaps be incorrect since the qualifications abolished refer rather to the incidents attached to the estates in expectancy when limited than to the rules of limitation themselves.

Taking the first period above mentioned, the old common law rules of limitation are not now of the same importance as they once were, not because they have been repealed, but because they have been superseded: in practice no interest in expectancy is now created by a common law limitation, and in those cases where an estate in expectancy, though created by way of use, was nevertheless treated as if created by a common law limitation, recent legislation has practically nullified this treatment by robbing it of its effect (see *infra*, pp. 139, 140). At the same time the old common law rules still have effect in cases where blundering conveyancers give them an opportunity to operate, and a knowledge of them is necessary to recognise such cases, and also to investigate titles going back, as most titles do, to times when their operation was more frequent than now; and besides this, as has already been intimated, to understand the rules now observed it is necessary to understand the rules once prevailing. We shall, therefore, deal shortly with these old rules, and the principles of the law of property in land which gave them being and which are still the foundation of that law.

Now the first principle which gave birth to a rule of limitation was that old familiar friend of law students, the principle that an estate of fee simple is, in the words of Lord COKE, "the most highest and absolute estate that a man can have" (Co. Litt. 4 a). In other words, a fee simple was the absolute ownership of the land as far as

(1) A fee simple is absolute estate in land.

**Sect. 1.** a subject could have absolute ownership. The grant, accordingly, of a fee simple by one subject to another exhausted all the ownership in the land which the grantor possessed. All that remained after the grant was a right of reverter. This right of reverter was not an estate, or even an interest, of any kind in the land granted : it was a mere incident of the tenure created between the grantor and the grantee by the grant ; and when the statute *Quia Emptores* enacted that future grants in fee simple were not to create tenure between the grantor and grantee, the right of reverter itself ceased (see *supra*, p. 21). That statute enacted that a grantee in fee simple should hold as tenant, not of his grantor, but of his grantor's lord. Accordingly, if the grantor himself had held of a lord who was a subject—or *mesne lord*—the grantee held from this mesne lord, but if the grantor had held from no mesne lord the grantee held from the sovereign or *lord paramount*. As mesne lords are now not very plentiful, the presumption is that every grantee in fee simple holds of the sovereign until the contrary is shown, and so now the only point in which ownership in fee simple is less than absolute or allodial ownership is this—that on the owner's death without heirs and intestate, his estate will revert or, as it is called, *escheat* to the Crown. If it were allodial it would probably do the same as goods in which the ownership is absolute do in effect, though the Crown claims them not by escheat but as *bona vacantia*. For ordinary purposes, therefore, we may, without danger of being led into any serious mistake, assume that an owner in fee simple in possession is an absolute owner (a).

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(a) As some real property lawyers entertain the notion that tenure as between sovereign and subject, and as between landlord and tenant, is, at this time of day, the basis of the law of real property, perhaps it may be as well to point out : (1) Even in Coke's time the distinction between allodial and feudal ownership was not theoretically—though then, no doubt, it was practically—of much importance. For instance, an exchange of land could only take place

## RULES OF LIMITATION.

Now the common law, recognising this, logically observed it in laying down rules for the limitation of estates in land, by holding that *no estate could be limited to follow a fee simple*. This is the first common law rule of limitation of estates in expectancy. Sect. 1  
Therefore estate can be limited after it.

The second principle which gave birth to a rule of limitation was that estates for life and in fee were the only legal interests which could subsist in land (*supra*, p. 5). What are now called chattel interests or leaseholds (*supra*, p. 25) were not regarded as legal interests in the land: a lease for years or other time certain was considered a mere personal contract between the freeholder or owner of the land and the lessee or hirer which conveyed no interest to the lessee, but merely gave him a right of action for damages against the lessor if the latter did not abide by the contract. Two consequences followed from this doctrine. The first was that common law rules of limitation paid no attention to the existence or non-existence of chattel interests in land. They were concerned solely with the freehold estates—the ownership. Accordingly, the freehold was parcelled out in successive estates in accordance with the common law rules of limitation without any regard for chattel interests subsisting concurrently in the land, and chattel interests were created without regard to the common law rules of limitation. (2) Freehold estates the only legal interests in land.

The second and more important consequence was that when the freehold or ownership of land was parcelled out in successive estates it could only be parcelled out in

at common law where the estates exchanged were equal; yet an in fee simple could exchange with the sovereign, whose estate was allodial (Co. Litt. 51 a); (2) At the present time the statute of *Quia Emptores* has been practically repealed in Ireland; the relation of landlord and tenant there no longer depends upon tenure, but is a matter of pure contract (Deasey's Act, 23 & 24 Vict. c. 154); and nobody knows the difference. (See Strahan's Law of Property, p. 33.)

**Sect. 1.** — estates for life and estates in fees simple or in tail. Ownership is in its nature a continuous right, whether it be ownership of land or goods. If anything ceases for one moment to be owned, if for one moment anything becomes *res nullius*, one must, to be able to assert ownership over it again, acquire it by a new title. For example, if I abandon my property, say, in an old pair of boots, by throwing them away, I cannot, on changing my mind, claim them again, on the plea of my old title, from some tramp who has picked them up. If I wish to own them I must make haste and pick them up myself before anyone else has done so, in which case I shall have the property in them by a new title, namely, occupancy of what was *res nullius*. In the same way the owner of land could not parcel out his ownership with gaps between the different parts—that is, between the different freehold estates granted. He could not grant the fee simple, for instance, from the end of the current year. If he did, then the ownership would be vacant till the end of the year, since an interest till the end of the year was not a freehold interest, *i.e.*, an estate for life or in fee. Neither could he grant, after an immediate estate for life, a remainder in fee, to commence from, say, a year after the determination of the life estate. Here, during the year between the determination of the life estate and the commencement of the remainder in fee, the ownership of the land would be vacant, since there could be no freehold estate for a year (*a*).

(*a*) I am quite aware that this explanation of the reason of the rule of limitation here discussed is not the orthodox one, which is that the reason a freehold estate had to be limited to commence immediately on the grant or immediately on the determination of a preceding freehold estate was because freeholds in possession could only be conveyed by livery of seisin, *i.e.*, the actual handing over of the ownership of the land. The weakness of this explanation of the rule is that it explains only half of it. Future freeholds were not conveyed by livery of seisin, but by grant, yet, nevertheless, they could not be conveyed so as to commence after an interval following the determination of a preceding freehold. The above explanation,

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Now in England the law as to land and the law as to goods differ in this respect: While you are permitted to abandon the ownership of goods, you are not permitted to abandon the ownership of land. If you own land you must, whether you wish it or not, remain owner until the ownership is transferred to someone else. Accordingly, when an owner in fee simple granted a freehold to commence, say, from the end of the current year, this would have, had it been permitted, amounted to an abandonment of the ownership till the end of the year. To prevent this, the law declared the conveyance void. The same was the case if there was a break or interval between two successive freeholds granted: the grant became void as to the time when the ownership would be vacant and as to all estates limited after that time. And when

whether right or wrong, has the merit of explaining both parts of the rule, and also the further merit of analogy with a rule applicable to the ownership of all other things than land, namely, that ownership must be continuous, and if once a break occurs in it the old title is lost for ever. The only exception to this rule is in the case of chattels real.

They may undoubtedly be the subject of a desultory limitation (*Earl of Bedford's Case*, 7 Rep. 7), and it would appear also that incorporeal hereditaments, such as rents, may, when created *de novo*, be limited in the instrument creating them in a desultory manner (*Rex. v. Kempe*, Ld. Raym. 49), but that is because they are treated less as ownership of land than as matter of contract with the owner (*i.e.*, the freeholder) of the land. COKE points out that co-parceners may agree to hold their joint estate in alternate years (Co. Litt. 167 a), but this, I think, should be regarded merely as an agreement as to the mode of enjoying what is all the time a joint estate. Another apparent exception arose under the old law in the case of an estate *pour autre vie* not limited to the owner and his heirs, where the owner died before the *cestui que vie*. This was the only instance in English law of the ownership—the freehold—of land being without an owner, and the limitations over notwithstanding, taking regular effect when the time came for them to vest in possession. It is to be observed, however, that this peculiar incident was not a matter of limitation, but arose from the actual fall of events. It is, nevertheless, a most peculiar incident.

**Sect. 1.** a grant became void, of course the ownership remained in the grantor who had failed totally or *pro tanto* to transfer it to another.

Therefore every freehold in expectancy must follow immediately a preceding freehold.

Now on the considerations here stated, the common law founded another rule of limitation of estates in land, holding that *freehold interests must be limited to commence either immediately from the grant or immediately in succession to a preceding freehold interest.*

(3) Every freehold a present interest.

The third principle which gave birth to a common law rule of limitation was that every freehold interest in land, whether it was an interest in possession or an interest in expectancy, was a present interest. In other words, the whole ownership of the land was regarded as a present right. The very name used to describe that ownership by lawyers indicates this : it is called the *seisin*, *i.e.*, the possession of the land. Now if the whole ownership—or seisin in fee—of the land is a present right, evidently every portion of it—if it be divided into portions—is a present right too ; and if it is divided into portions, evidently also every such portion but one—the one in possession—must be an interest in expectancy. Accordingly, all freehold interests in land whether in possession or in expectancy must, as has just been said, be a present right of ownership.

Now, logically, a present right cannot exist unless there is a living and ascertained person in whom it is vested. A present right to a thing—whatever the thing may be—assumes an existing person to exercise the right. Rights cannot exist *in nubibus* : they are privileges belonging to some person or other.

Therefore every freehold in possession or in expectancy must have an owner.

Accordingly, the common law, on these considerations, founded the third rule of limitation, namely, that *the seisin of land, that is, the ownership and all parts of the ownership whether in possession or in expectancy, must never be without an owner.*



Sect. 1.

This seems the proper place to state and explain shortly a very famous rule which if forgotten or misunderstood may defeat the intention of the parties to a settlement. That rule is what is known as the *Rule in Shelley's Case*. To comprehend it clearly, it is necessary, I have always thought, to remember the state of the law when it came into existence.

At that time the rule of limitation just stated was applied in all its vigour and rigour to the limitation of estates in expectancy. It had not yet been relaxed as we shall shortly see it subsequently was. In order that an estate in expectancy should be valid it had to be limited to an owner—that is, to a living and ascertained person, or, in the language of to-day, it must have been *vested*. If it was limited to a non-existent person—an unborn person—or to an unascertained person—who, in law, was the same as a non-existent person—if it were, in the language of to-day, *contingent*, the limitation was bad *ab initio*.

Now the heir or the heir of the body of a living person is always in law a non-existent, and, in fact, an unascertained person. *Nemo est heres viventis* is the legal maxim (Co. Litt. 8 b). It is only the dead who have heirs at law. Accordingly, if an estate were in those days limited to a living person's heirs or heirs of the body, the limitation would have been bad. There is no heir to the

Nevertheless (such is the perversity of human nature) settlors sometimes did limit estates to the heirs or to the heirs of the body of living persons. Usually those limitations took this form : A life estate was given to the person in question, and on his death a fee was given to his heirs or to the heirs of his body. Sometimes life estates to other persons were interposed between the life estate given to the ancestor and the fee given to the heirs, as, for example : “To A. for life and on A.'s death to his wife B. for life



**Sect. 1.**

Therefore in  
a limitation  
to A. for life  
and then his  
heirs the heirs  
take nothing.

and on B.'s death to the heirs of A." Now, strictly construed, the fee to the heirs, whether limited to succeed at once the life estate of their ancestor—or immediately, as it was called—or to succeed some other estate or estates following the life estate of their ancestor—or mediately, as it was called—should have failed as a limitation to unborn, or, at any rate, unascertained, persons. To prevent this failure, the court applied a rule of construction which has now become a rule of law, and which may be stated thus: *It is a rule of law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate of inheritance is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase (Shelley's Case, 1 Rep. 104 a) (a).*

Extent of  
this rule.

Elsewhere I have attempted to explain in some detail this technical rule (see Strahan's Law of Property, p. 125), every part of which is, as Lord MACNAGHTEN says, "deserving of attention, from the opening words which declare the rule to be 'a rule of law,' to the last clause which says that the heirs can never take by purchase in a

(a) As at the time the rule in *Shelley's Case* arose, estates of inheritance were inalienable, and descent was traced not from the last purchaser, but from the person last seised, the effect of the rule then was practically to carry out the intentions of the grantor, even when those intentions were to give the ancestor only a life estate and the fee or fee tail in remainder to his heirs or the heirs of his body. It could matter little to the grantor whether the heirs or heirs of the body took by purchase or inheritance, provided they did take. The importance of the rule at that time was that it prevented the grantor's intentions from being defeated through the technical rule that no estate could be limited to an unascertained person. It is only since alienation of fees has been permitted that the rule has become important as enabling the ancestor to defeat the grantor's intentions. It is an irony of time that a rule invented to effectuate a grantor's intentions should now never be invoked except for the purpose of defeating them.

case to which the rule applies (*Van Grutten v. Foxwell*, [1897] A. C. 658, at p. 668).

**Sect. 1.**

Here it is sufficient to sum up its effect very shortly. The words "heirs" and "heirs of the body" are the apt words to limit estates in fee simple and fee tail at common law. Unless the grant be to the grantee and his heirs, or the grantee and the heirs of his body, an estate in fee simple or an estate in fee tail cannot pass; and if the grant be to the grantee and his heirs, or to the grantee and the heirs of his body, nothing but an estate in fee simple or an estate in fee tail can pass. The words which are at common law necessary to limit these estates, are irresistible to carry them. The fact that the grantor indicates in the strongest way that he does not intend to pass such estate, is impotent to prevent the words from having their legal effect. He may say that he grants the estate to the grantee for life, and after his death to his heirs; he may say that he grants the grantee an estate for life, and after his death an estate to some one else for his life, and afterwards to some one else an estate for his life, and then the fee to the heirs of the first grantee; or he may in so many words say he does not intend to give the grantee an estate in fee simple or in fee tail; if he use the apt words for creating an estate in fee simple or fee tail—to the grantee and his heirs, or to the grantee and the heirs of his body—however he may explain or qualify them, an estate in fee simple or in fee tail passes to the grantee.

It is true that if he shows that by heirs or heirs of the body he intends not to include all who at any time would come under this description, but the particular person or persons who would answer it at the death of the grantee, and who were to take not as the heir of the grantee, but as *personae designatae*, and form the stock of the descent for the estate granted to them, then the words "heirs" and "heirs of the body" cease to be words of limitation of the

**Sect. 1.** estate granted to the ancestor, and the persons who answer to these descriptions at the death of the ancestor, take the inheritance granted as purchasers. But short of this, a grant to a grantee “and his heirs” or “and the heirs of his body,” always carries to the grantee an estate in fee simple or in fee tail (*Evans v. Evans*, [1892] 2 Ch. 173).

In order, however, that this rule shall apply, it is necessary that the technical words “heirs” and “heirs of the body” should be used (in a will, any other expression construed as equivalent to these words is sufficient). And further, the estates granted to the ancestor and his heirs or heirs of the body must be of the same quality—either both legal or both equitable.

This rule is still applied to the construction of grants and wills with all strictness.

Common law  
estates in  
expectancy.

(1) Reversion.

(2) Vested  
remainder.

Returning to the rules of limitation at common law set out above, two future estates or estates in expectancy arose under them. The first was called a *reversion*. A reversion arises when an owner of an estate in land grants away a smaller estate than his own; the smaller estate is then called the *particular estate*, and the portion of his old estate left in the grantor is called the reversion on the particular estate. The second was called a *remainder*. A remainder arises when an owner of an estate in land grants to the grantee a smaller estate than his own, and by the same instrument grants to another grantee the rest of his estate; the new estate here created after the particular estate is called the remainder upon it. Thus, if A., an owner in fee simple, grants a life estate to B., the estate in fee in expectancy on A.’s life estate, which is what remains in A. after the grant, is the reversion on B.’s life estate. If, however, A. when he granted B. the life estate, had by the same instrument granted the fee in expectancy on B.’s life estate to C. and his heirs, C.’s estate would be the

## RULES OF LIMITATION.

remainder on B.'s life estate, because it would be a new estate granted by A. to follow B.'s life estate.

**Sect. 1.**  

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Formerly, the distinction between reversions and remainders was of some little importance since there is tenure between the owner of the particular estate and the reversioner, while there is no tenure between him and the remainderman. But as the incidents of tenure have become of less and less importance, so has the distinction between reversions and remainders, and now in practice, little trouble is taken to distinguish between them.

As long as the principle of limitation that every interest in land, whether in possession or in expectancy, must have a living and ascertained owner remained unrelaxed, these were the only freeholds in expectancy which could be created. At a very early period, however, the rule was relaxed so as to permit limitations of interests in expectancy—it never permitted the limitation of interests in possession—to unborn and unascertained persons, subject to certain restrictions. It became necessary to distinguish these from the more ancient estate. They were, of course, remainders since they must in the nature of things be new estates; so to distinguish them from the old remainders the latter were called *vested* remainders, while the new remainders were called *contingent* remainders, that is, interests as to which, whether or not they ever became real or vested remainders, depended on a contingency. Till that contingency happened, they were not regarded as estates in the land; they were regarded as mere *possibilities* or chances of estates. The whole ownership was regarded as being vested in the owner of the particular estate and of the vested remainders; but these latter were liable to be displaced by the contingency in question happening, and the possibility becoming a vested remainder, or, it might be, an estate in possession.

Limitation  
to unascertained  
persons not per-  
mitted.

(3) Con-  
tingent  
remainder

**Sect. 1.** As has been said, the common law permitted the creation of these contingent remainders only subject to certain restrictions. The first of these was this: *A contingent remainder cannot be limited to the unborn child, or to the heir, of an unborn person.* In other words, the unborn or unascertained person to which the interest is limited, must be a person who is sure to be born or ascertained, if at all, during the life or lives, or immediately on the death or deaths of persons living at the time the limitation is made. This rule still is in force (*Whitby v. Mitchell*, 44 Ch. D. 85), though, as we shall see, another rule based upon it is more commonly seen in operation.

Restrictions or limitations to unascertained  
double possibilities.

(2) Rule as to vesting.

The second restriction was scarcely a restriction of the power of creating contingent remainders, but rather an infirmity of constitution which they inherited from the common law at their birth, and which often brought them to an early grave. That restriction was as follows: *The contingency on which a contingent remainder depends, must occur during the existence or immediately on the determination of the particular estate preceding it, or the contingent remainder will fail altogether.* For example, if a fee simple be granted to A. for life, and on his death to the eldest son of B.—a bachelor—in fee, then if B. have not a son either during A.'s life, or at any rate at A.'s death, the fee simple limited to B.'s eldest son will fail altogether, and an eldest son of B.'s, born after A.'s death, will have no claim under the grant (a). As we shall see, this rule comes into operation now very seldom, save as to contingent remainders arising under instruments executed before August 2nd, 1877 (40 & 41 Vict. c. 33). The

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(a) It is to be remembered that a child *en ventre sa mère* is regarded now for purposes both of inheritance and of purchase as already born (10 & 11 Will. 3, c. 16). For an account of the controversy which led to the passing of this statute which altered the old rule that a child *en ventre* was born for purposes of descent, but not for purposes of purchase, see Butler's Note (3), Co. Litt. 298 a.

legislation which has led to this result does not here concern us. We will refer to it shortly when considering executory interests (see p. 140). Sect. 1.

We have already referred to the rise of the system of Limitation of uses under which the beneficial interest in land could by virtue of the Chancellor's power, be dealt with in a way which the common law courts would not allow. Liberal as the Chancellor was in permitting the use to be conveyed without the old common law formalities, he was even more liberal in permitting it to be limited regardless of the old common law rules of limitation. He absolutely abandoned all of these. At common law, no estate could be limited to follow a fee simple; the Chancellor permitted one fee to be limited after another without difficulty. Thus a use (1) After a fee simple. might be limited to A. and his heirs, but if A. married, then to A. for life, and on his death to his eldest son in fee. Again, at common law an estate in expectancy must (2) Not in succession to precede interest. be limited to commence on the regular determination of the particular estate. A use could be limited either to defeat the particular estate (as in the example last given, when the fee simple to A. is defeated on his marriage, and the ownership of the settled land in that event is divided up between A. and his eldest son), or without any particular estate at all (as if Whiteacre be limited to B. and C. in fee simple to the use of the first son of A.'s—A. being a bachelor—who attains the age of twenty-one years). In the third place, at common law an estate in possession could never, and an estate in expectancy could only subject to restrictions (*supra*, p. 136), be limited to unborn or unascertained persons. A use, on the other hand, either in possession or in expectancy, might be fully limited to an unborn or unascertained person. Thus in (3) To unascertained person. the last example, the use to A.'s eldest son is a use in possession limited to an unborn person. In such limitations there is usually a direction to the trustees to accumulate the income until a person presents himself who



**Sect. 1.** fulfils the conditions of the gift—that is, in the present example, until A. has a son who attains the age of twenty-one years.

As is said above, a use in possession or in expectancy might be fully limited to unborn or unascertained persons. By this is meant that there was no such restriction as to the person being born or ascertained during or immediately on the determination of the particular estate in case where there was a particular estate. An equitable contingent remainder—that is, an estate in the use which, if it had been an estate in law, would have been a contingent remainder—was not liable to be defeated by the contingency on which it depended not occurring during the existence or immediately on the determination of the particular estate preceding it. Thus, if the limitation of the use or beneficial interest were to A. for life, and then to the first son of A.'s who attained the age of twenty-one years in fee, the fact that A. died leaving only a son, say of ten, would not cause the defeat of the limitation to A.'s son; the trustees would hold the estate until such son attained twenty-one, or died, and on his attaining that age, the beneficial interest in fee would vest in him. This immunity from defeat which characterised limitations of the ancient uses of lands still applies to limitations of the beneficial interest in lands or goods subject to a trust.

Uses made  
legal estates.

As has already been pointed out, the effect of the Statute of Uses was not to prevent the creation of uses in the future, but to clothe such uses when created with the legal estate in the land (*supra*, p. 9). The consequence of this was, as has also been pointed out, that henceforth it became possible to create legal estates in land by the same instruments as formerly applied only to limitations of a use (*supra*, p. 14). Another consequence was that henceforth it became possible to create legal estates in land on the same rules of limitation as formerly applied only to



limitations of a use. All that was necessary in order to make the equitable rules of limitation apply to the legal estate was to limit, not the legal estate, but the use of the land, and leave it to the Statute of Uses to clothe the interests in the use so limited with the legal estate. That is what is now called a limitation by way of use. Thus, if it was desired to limit other estates after a determinable fee, it could be done by limiting the land first to a grantee to uses, and then limiting the fee simple of the use followed by the other estates it was desired to create. To take the example dealt with above, by limiting the land to B. and his heirs to the use of A. and his heirs, but if A. married, then to the use of A. for life, and on his death to his eldest son in fee, a legal estate was created to follow a legal fee simple just as previous to the Statute of Uses an equitable estate would have been created to follow an equitable fee simple. In the same way a legal estate in expectancy could be created independently of the determination or existence of a preceding freehold estate, and a legal estate in possession might be limited to an unborn or unascertained person.

It has been pointed out that equitable estates in expectancy have never been liable to be defeated by the determination of any estate preceding them before the contingency on which they were to vest had occurred. This immunity from defeat was always shared by legal estates limited by way of use to this extent : Where such legal estates were estates which could not be limited according to the common law rules of limitation, they were not to be so defeated. Such estates were called executory interests, or springing and shifting uses, and in all their incidents they were simply equitable interests clothed by force of statute with the legal estate. Where, however, such legal estates, though limited by way of use, yet were estates which could have been limited according to the common law rules of limitation, they were liable to be so defeated. Such estates were regarded simply as contingent remainders, and in all their

Executory interests not liable to defeat.

Contingent remainders limited by way of use liable to defeat.

**Sect. 1.**

incidents were those of contingent remainders at common law. Thus if the limitation were to A. and his heirs to the use of B. and his heirs until B. married, and then to such son of C.'s as first attains the age of twenty-one and his heirs, here if B. married before C. had a son who had attained twenty-one, the limitation over to such son would not fail, because the estate given to him was one which could not be created at common law ; it was a fee simple limited after a fee simple, and therefore could not be a remainder of any kind. But if the limitation had been to A. and his heirs to the use of B. for life, and on his death to the first son of C. who attains twenty-one, then if B. died before C. had a son who had attained twenty-one, the estate limited to C.'s son would fail because, though limited by way of use, it was an estate which could be created at common law—it was a fee simple in expectancy limited to come into possession on the regular determination of a preceding freehold estate, and therefore could be and was regarded as a remainder at common law.

**Contingent  
Remainders  
Act, 1877.**

This liability to fail now attaches only to interests created by way of use by instruments executed before August 2nd, 1877. By the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), every contingent remainder created by any instrument executed after the passing of the Act or by will or codicil revived or republished by any will executed after that date, in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use in a deed or executory devise in a will, without being preceded by any particular estate of freehold.

**Sect. 1.**

In order that this enactment may apply to any contingent remainder that remainder must be such as would be capable of taking effect as an executory interest had it not had a preceding estate of freehold to support it. Now in order that a contingent remainder might have been good as an executory interest without a preceding freehold, it must when limited by deed—it is different, we shall see, when it is limited in a will—be limited by way of use. If limited directly without a preceding estate to support it, it would be good neither as an executory interest nor as anything else; it would be a freehold limited *in futuro* at common law, and therefore void. Accordingly, the Act does not help contingent remainders limited directly. If the contingent remainder arises on such a limitation as this—"Unto and to the use of A. for life, and on A.'s death unto and to the use of A.'s first son who attains twenty-one," it will be still liable to fail if the particular estate determines by the death of A. before any son of his attains twenty-one.

The second condition which a contingent remainder must fulfil in order to be one which would be good as an executory interest if it had not had a preceding estate of freehold to support it, is that it should be within the rule against perpetuities which applies to executory interests in the same way as the rule against double possibilities applies to contingent remainders (*supra*, p. 136). As we have seen, the effect of that rule is that to be good, a contingent remainder must be limited to vest (if it vests at all) during the life or lives, or immediately upon the death or deaths, of some person or persons living when the limitation was made. By the rule against perpetuities an executory interest to be good must be limited so as to vest (if it vests at all) either during the life or lives or within at most twenty-one years after the death or deaths of some person or persons living when the limitation was made.

**Sect. 1.** In applying this rule, it is well to remember three points. First, as in the rule against double possibilities, a child *en ventre sa mère* is regarded for its purposes as living; secondly, the twenty-one years may either be the minority of a person living at the death of the last person mentioned in the settlement or twenty-one years in gross—that is, depending on no contingency (*Cadell v. Palmer*, 7 Bligh (N.S.) 202); and lastly, the possible and not the probable time of vesting must decide whether the limitation is within the rule (*In re Mervin*, [1891] 3 Ch. 197). If the period allowed may by possibility be exceeded, the limitation is bad *ab initio*, and so are all the limitations following the obnoxious limitation.

A contingent remainder, then, which does not come within the rule as to perpetuities is still liable to fail if the contingency on which it is to vest does not occur during the existence of the preceding freehold, or immediately on its determination. Thus, on a limitation to C. and his heirs to the use of A.—a bachelor—for life, and on his death to the first son of A. who attains the age of twenty-five in fee, the contingent remainder to A.'s unborn son is not within the rule against perpetuities, since A. may have a son who attains twenty-five, but does not attain it until more than twenty-one years after A.'s death. Accordingly the estate limited to him is not one which will be helped by the Contingent Remainder Act, since it is not one which would be good as an executory interest if it had not had an estate of freehold to support it. But that estate is within the rule against double possibilities, and therefore is good as a contingent remainder as far as the common law rules of limitation are concerned. If, however, no son of A.'s—should he have sons—attain the age of twenty-five before A.'s death, the contingent remainder will fail.

Extent  
of rule.

This rule against perpetuities applies, as we shall see, not merely to springing and shifting uses, but to all

interests in expectancy, however arising, and whether in realty or personalty, save only contingent remainders. It applies also not merely to interests in expectancy, but to conditions attached to vested interests which may cause the determination of such interests even, it would seem, when these conditions are such as were good at common law centuries before the rule against perpetuities was heard of (see *In re Trustees of Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 540). Thus, on a grant in fee simple to trustees, a condition that if the premises conveyed are ever used for any other purposes than that for which they are conveyed they are to revert to the grantor's heirs has been held bad as against the rule against perpetuities (*ibid.*). The rule, however, does not apply to (1) limitations after estates tail ; (2) limitations over from one charity to another ; (3) perpetual covenants to renew in leases ; (4) or perpetual covenants in defeasance of leaseholds.

SECTION II.

A MARRIAGE SETTLEMENT.

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Strict and  
personal  
settlements.

SETTLEMENTS of lands are made by various instruments and on various occasions. Thus they are made by deeds and by wills, and by written but unsealed declarations of trusts (see *supra*, p. 32). And they are made on the occasion of the settlor's marriage, and on the occasion of his death, and on the occasion of a tenant in tail in remainder coming of age. But by whatever instrument and on whatever occasion they may be made, their primary object is to ensure as far as possible either that certain lands shall remain the property of the eldest male representative of a certain family, or that their proceeds shall be preserved as a provision for the family of a certain person. When the former is the object, the settlement is said to be a *real* or *strict* settlement ; when the latter a *personal* settlement.

A marriage  
settlement.

Not unfrequently a marriage settlement combines both a strict and a personal settlement. That is the case in the one now about to be given :

Date.  
Parties.

“ THIS INDENTURE made the twenty-ninth day of  
December one thousand eight hundred and ninety-nine

A MARRIAGE SETTLEMENT.

between John Doe of Long Acre in the parish of Morton Pinkney in the County of Northampton Esquire of the first part Rosa Roe of Beaulieu Hall in the parish of Morton Pinkney in the County of Northampton spinster of the second part and John Dorey of 3003 Bedford Row in the County of London Solicitor and Bertram Black of the Home Farm in the parish of Morton Pinkney aforesaid Esquire (hereinafter called the trustees of these presents) of the third part WHEREAS a marriage has been agreed upon and is intended to be solemnized shortly after the execution of these presents between the said John Doe and Rosa Roe AND WHEREAS the said John Doe is seised in unincumbered fee simple of the lands and hereditaments set out in the first schedule hereto AND WHEREAS the said Rosa Roe is possessed of the messuages and lands specified in the second schedule hereto for the respective residues of the terms granted by the several leases specified in such schedule subject to the rents covenants and conditions reserved by and contained in such respective leases AND WHEREAS upon the treaty for the said intended marriage it was agreed that such settlement should be executed as hereinafter appears and that such provision should be made for the settlement of the other and after acquired property of the said Rosa Roe as is hereinafter contained NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the said intended marriage the aforesaid John Doe as settlor hereby conveys unto the trustees of these presents the lands and hereditaments situate in the parish of Morton Pinkney in the county of Northampton particularly described in the first schedule hereto To HOLD the same unto the said trustees in fee simple To the use of the said John Doe and his heirs until the said intended marriage and from and after the said intended marriage To the use that during the joint lives of the said John Doe and Rosa Roe the said Rosa Doe shall receive a yearly rentcharge of £100 to commence from the said marriage and to be paid by equal half-yearly payments the first thereof to be made

Sect. 1  
Recital of intended marriage.  
Recital of title.  
Recital of agreement to settle.  
A. Strict settlement  
Testatum considered  
Operative words.  
Habendum Uses.  
(1) Fee determination on marriage  
(2) Charge in pin-money



**Sect. 2.**  

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(3) Life  
estate.

(4) Jointure.

(5) Portions  
term.(6) Estates  
tail.(7) Fee  
simple.  
Portions  
term.Definition of  
younger  
children.Powers of  
trustees.

at the end of six calendar months after the said marriage the said rentcharge to be for her separate use without power of anticipation And subject to the said rentcharge To the use of the said John Doe during his life without impeachment of waste with remainder To the use that the said Rosa Roe should she survive the said John Doe shall receive d'uring her life for her jointure a yearly rentcharge of one thousand pounds to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the expiration of six calendar months after his death And subject to the said rentcharge to the use of the trustees of these presents for the term of one thousand years to commence from the decease of the said John Doe without impeachment of waste upon the trusts hereinafter declared concerning the same And subject thereto to the use of the first and every other son of the said John Doe by the said Rosa Roe successively in remainder one after the other according to their respective seniorities and the heirs male of their respective bodies and in default of such issue to the use of the said John Doe in fee simple And it is hereby agreed and declared that the said premises are hereby limited to the trustees of these presents for the said term of one thousand years upon trust if there shall be any younger child or children of the said intended marriage (meaning thereby any child or children who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under it other than any son or sons who before his or their attaining or respectively attaining that age shall become entitled in possession or in remainder under these presents to the hereditaments hereby settled for an estate in tail male immediately expectant on the decease of the said John Doe) then the trustees of these presents shall after the death of the said John Doe or during his life time at his request in writing raise by mortgage or sale of the said hereditaments or any part thereof for all or any part of the said term or by and out of the rents and profits thereof or any part

**Sect. 2.**  

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thereof or by any other reasonable ways or means such sum of money as is hereinafter mentioned that is to say if there shall be only one such younger child the sum of two thousand pounds and if there shall be only two such younger children the sum of five thousand pounds and if there shall be three or more such younger children the sum of ten thousand pounds and shall hold the same in trust for all or any of such younger children in such manner and in such shares as the said John Doe shall by any deed or deeds revocable or irrevocable or by his will appoint And in default of and subject to such appointment in trust for the said younger child or children if more than one in equal shares as tenants in common Provided always that no child taking a share under any appointment shall have any share in the unappointed part (if any) of the said money without bringing his or her appointed share into hotchpot and accounting for the same accordingly unless the said John Doe in making such appointment shall otherwise direct And upon further trust that the said trustees shall after the death of the said John Doe by any such means as aforesaid raise such annual sum not exceeding what the interest of the expectant portion or portions for the time being of any child or children of the said intended marriage at the rate of four per centum per annum would amount to and shall apply the same for the maintenance and education or benefit of such child or children for the time being entitled in expectancy to a portion or portions as the said trustees shall think fit with liberty either themselves to apply the same or to pay it to the guardian or any of the guardians of such child or children without seeing to the application thereof Provided also that it shall be lawful for the trustees of these presents upon the request in writing of the said John Doe during his life and after his death at their own discretion by all or any of the ways and means aforesaid to raise any part or parts not exceeding together one moiety of the presumptive portion of any son being a minor and to apply the same for the advancement preferment or benefit of such son in such

Extent of portions.

Power to appoint.

Trusts in default of appointment.

Hotchpot clause.

Maintenance clause.

Advancement clause.

**Sect. 2.**  

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Trustees  
under Settled  
Land Acts  
and Con-  
veyancing  
Act.

Modification  
of s. 42, Con-  
veyancing  
Act.

Mining rents.

*B. Personal  
settlement.*

Second  
testatum.

Considera-  
tion.

Operative  
words.

manner as the said John Doe shall request or as the said trustees shall after the death of the said John Doe think fit and the money so raised shall be reckoned as part of the share of such son if he shall attain the age of twenty-one years Provided always and it is hereby agreed that subject to the foregoing trusts and power the said trustees shall permit the rents and profits of the hereditaments to be received by the person or persons for the time being entitled to the said hereditaments subject to the said term And it is hereby agreed and declared that the said trustees shall be the trustees hereof as to the lands hereinbefore assured for the purposes of the Settled Land Acts 1882 to 1890 and also for the purposes mentioned in section forty-two of the Conveyancing and Law of Property Act 1881 and if any person during whose infancy the said trustees shall be in possession of the hereditaments hereby settled under that section shall die while an infant being tenant for life or in tail by purchase the accumulated fund arising as in the said section mentioned shall be held by the said trustees upon the trusts which would be applicable thereto if the same were capital money arising from the sale of part of the hereditaments hereby settled under the Settled Land Acts And it is hereby also agreed and declared that no part of the rent arising under any mining lease or grant of any hereditaments for the time being subject to the uses or trusts of these presents shall be set aside as capital money under the Settled Land Acts 1882 to 1890 or otherwise but the whole thereof shall go and be received and applied as rents and profits AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and in consideration of the said intended marriage the said Rosa Roe as settlor with the approbation of the said John Doe hereby assigns unto the said trustees of these presents the messuages and lands specified in the second schedule hereto for the respective residues of the terms granted by the several leases specified in such schedule subject to the rents covenants and conditions reserved by and contained in such

respective leases To hold the same unto the trustees for the said respective residues now unexpired and subject to the said rents covenants and conditions In trust nevertheless for the said Rosa Roe until the said intended marriage shall be solemnized And from and after the solemnization thereof In trust that the said trustees shall at the request in writing of the said John Doe and Rosa Roe or the survivor of them and after the decease of such survivor at the discretion of the said trustees sell all the said messuages and land hereby assigned with all the powers in that behalf of an absolute owner And shall out of the moneys arising from any such sale pay the costs of such sale or otherwise incurred in respect of the premises and shall hold the residue of such sale moneys upon the trusts and subject to the powers and provisions hereinafter declared concerning the same and shall pay and apply the net rents and profits of the said premises or of the unsold part thereof for the time being to the person or persons and for the purposes to and for which the income of the investments hereinafter directed to be made of the net moneys to arise from the sale thereof would be payable or applicable under the trusts hereinafter contained if such sale or investment were actually made And it is hereby agreed and declared that the said trustees shall with the consent in writing of the said John Doe and Rosa Roe or the survivor of them during their his or her lifetime and after the death of such survivor at the discretion of the said trustees invest the residuary or net moneys to arise from the sale under the trust for sale hereinbefore contained of the messuages and lands hereby assigned or any of them as and when the money shall be received in the names of the said trustees in or upon any stocks funds or securities in or upon which trustees may by law invest trust funds except real securities in Ireland And may with such consent or at such discretion as aforesaid vary or transpose such investments into or for others of any nature hereinbefore authorised And shall pay the income of the said investments to the said Rosa Roe during her life so that during the intended coverture

**Sect. 2.**  
Habendum.  
 Trusts.  
 Trust for sale.  
 Investment of proceeds.  
 Trusts of income.

**Sect. 2.**Trusts of  
corpus.Powers of  
appointmentTrusts in  
default of  
appointment.Hotchpot  
clause.Ultimate  
trusts in  
default of  
issue.

the same shall be for her separate use without power of anticipation And after the death of the said Rosa Roe shall pay the said income to the said John Doe if surviving And after the death of the survivor of them the said John Doe and Rosa Roe shall stand possessed of all the said trust premises and the future income thereof In trust if there be any younger child for all or any of the younger children of the said intended marriage as hereinbefore described or any issue of such younger child or children at such ages or times or age or time (not being earlier as to any object of this power than his or her age of twenty-one years or day of marriage) in such shares if more than one upon such conditions and in such manner as the said John Doe and Rosa Roe shall by any deed or deeds revocable or irrevocable jointly appoint And in default of such appointment and so far as any such appointment shall not extend then as the survivor of them the said John Doe and Rosa Roe shall by any deed or deeds revocable or irrevocable or by his or her will appoint And in default of such appointment and so far as any such appointment shall not extend In trust for the said younger child or all the younger children of the said intended marriage if more than one in equal shares but if there shall be but one child of the said intended marriage then the whole to be in trust for such one child [*Hotchpot clause, supra*] And if there shall be no child of the said intended marriage who shall attain a vested interest in the said trust premises under the foregoing trusts In trust for the said Rosa Roe absolutely if she shall survive her now intended coverture but if she shall die during her now intended coverture then upon such trusts as the said Rosa Roe shall by her will appoint And in default of such appointment and so far as any such appointment shall not extend In trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said Rosa Roe have been entitled thereto if she had died possessed thereof intestate and without leaving a husband or issue her surviving such persons if more than one to take as tenants in



common in the shares in which the same would have been divisible between them under the same statutes Sect. 2.  
*[Advancement clause, see supra]* And it is hereby agreed and declared that it shall be lawful for the said trustees Advancement clause.  
as long as the messuages and lands hereby assigned Trustees' powers of management.  
remain unsold to let or demise the same either from year to year or for any term of years not exceeding twenty-one years at such rent and subject to such covenants and conditions as they shall think fit and to accept surrenders of leases and tenancies and generally to manage the property with the ordinary powers of absolute owners  
And it is hereby agreed and declared that if the said Rosa Roe shall at the time of the said intended marriage Covenant to settle after acquired property.  
be or if at any time during the said intended coverture she shall become seised possessed or entitled of or to any real or personal property (other than property specifically settled) for any estate or interest whatsoever in possession reversion remainder contingency or expectancy except property of a less value than three hundred pounds Exceptions from the covenant.  
vesting in possession before or during the said intended coverture at the same time and from the same source and except the accumulations whether invested or not of income belonging to the said Rosa Roe and except property purchased for value by the said Rosa Roe and except any property as to which in the instrument under which it is acquired by the said Rosa Roe an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature and except moveable chattels or effects of household or domestic or personal use or ornament all of which excepted property it is hereby declared shall be and remain the absolute property and separate estate of the said Rosa Roe and except also an annuity or other estate or interest for the life of the said Rosa Roe or for any time or period determinable on her death which it is hereby declared shall belong to the said Rosa Roe for her separate use and during the intended coverture without power of anticipation then and as often as the same shall happen all such real and personal estate (except as

**Sect. 2.**  

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Proviso for  
trustees'  
indemnity.

Power for  
trustees to  
settle  
questions.

Power of  
trustees to  
appoint  
agents.

Power of  
solicitor  
trustee to

aforesaid) shall forthwith at the expense of the trust estate be assured or transferred by the said Rosa Roe and all other necessary parties (if any) to the said trustees upon trusts as nearly corresponding with the trusts hereby declared of the messuages and lands hereby assigned by her as may be and so that such real property shall be impressed with a trust for conversion into money and be settled as personal estate Provided always that the said trustees shall not be accountable or liable in respect of any real or personal estate which may become subject to the said agreement and provision for the settlement of the other and after acquired property of the said Rosa Roe unless or until the same shall have been actually assured paid or transferred to them or him nor for omitting to take proceedings to get in the same real or personal estate or any part thereof And it is hereby agreed and declared that it shall be lawful for the said trustees to determine whether any money shall for the purposes of these presents be considered as capital or income and out of what part of the said trust premises and whether out of income or capital any expenses outgoings or losses shall or ought to be paid and also to apportion as they shall think proper any funds subject to different trusts which may have become blended And to determine all questions and matters of doubt arising in the execution of the trusts of these presents and that every such determination whether upon a question actually raised or implied in the acts and proceedings of the said trustees shall be conclusive and bind all persons interested under these presents And it is hereby agreed and declared that the said trustees shall not be bound in any case to act personally but shall be at full liberty to employ a solicitor or any other agent to transact all or any business of whatsoever nature required to be done in the premises (including the receipt and payment of money) and shall not be responsible for the default of any such solicitor or agent occasioned by his employment And further that John Dorey aforesaid or any other trustee for the time being



hereunder being a solicitor shall be entitled to charge **Sect. 2.**  
 and be paid all usual professional or other charges for <sup>charge for</sup>  
 any business done by him or his firm whether in the <sup>work.</sup>  
 ordinary course of his profession or not and although  
 not of a nature requiring the employment of a solicitor  
 And it is hereby agreed and declared that the power of <sup>Power to</sup>  
 appointing new trustees of these presents conferred by <sup>appoint new</sup>  
 statute shall be vested in the said John Doe and Rosa <sup>trustees.</sup>  
 Roe during their joint lives and the survivor of them  
 during his life And it is hereby agreed and declared <sup>Declaration</sup>  
 that all powers authorities and discretions hereby <sup>as to powers</sup>  
 expressed to be vested in or given to the trustees of these <sup>of trustees.</sup>  
 presents shall be vested in and exercisable by the said  
 trustees hereby appointed and the survivors or survivor  
 of them or other the trustees or trustee for the time  
 being of these presents and that a sole trustee shall be  
 competent to act for all purposes.

IN WITNESS, etc.

FIRST SCHEDULE above referred to.

*[Particulars of husband's lands.]*

SECOND SCHEDULE above referred to.

*[Particulars of wife's lands.]*

The above contains in effect two settlements—a strict <sup>Observation</sup>  
 settlement of the husband's estate, and a personal settle- <sup>on preceden</sup>  
 ment of the wife's. The husband's estate is limited strictly  
 to the eldest male descendant of the intended marriage ;  
 the wife's is used as a fund for making adequate provision  
 for those other descendants who are excluded from the  
 enjoyment of the hereditary estates. This is a device  
 frequently resorted to.

The above also is drawn in contemplation of one  
 marriage only ; some marriage settlements make provision  
 for a second marriage and family. In this case power is  
 given to the husband to jointure another wife, and to  
 portion his children by her. Where the settlement is

**Sect. 2.**            also of the wife's fortune, she is empowered to revoke appointments of the settled estate to the children by the contemplated marriage to the extent usually of from one third to two thirds, according to the number of such children, and to appoint to that extent among her children by a second marriage. These provisions have not been set out above because, though usual and proper, they complicate the precedent without affording any matter an explanation of which would in any way assist the student better to understand the law and practice relating to marriage settlements.

We will treat the whole settlement now, clause by clause, as we dealt previously with grants and leases.

## SECTION III.

## STRICT SETTLEMENT CLAUSES.

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As has already been pointed out, the date from which a deed operates is not the date inserted in it, but the date upon which it was sealed and delivered (*supra*, p. 43). This is particularly important in the case of marriage settlements. Marriage is, in law, a valuable consideration to support any instrument or agreement entered into between the parties before, but not after the marriage. A post-nuptial settlement not made in pursuance of a written

**Sect. 3.** agreement entered into before the marriage is a voluntary settlement, and is therefore subject to the legal infirmities affecting these (*supra*, p. 66). Now marriage settlements are always executed very shortly before, and not infrequently upon the same day as the marriage ceremony. Where they are executed on the same day, in order to support them, the court presumes till the contrary is shown that they were executed before the ceremony, in accordance with the rule that instruments are presumed to be executed and acts are presumed to be done in the order which would make them effective to carry out the intentions of the parties (*Gartside v. Silkstone and Dodworth Coal Co.*, 21 Ch. D. 762). In the same way, since a subsequent marriage of a testator revokes his will, when a man marries and makes his will on the same day (two acts not so very dissimilar as they may seem), the court will presume until the contrary is shown that the will was executed *after* the marriage.

Parties.

There are three parties to the foregoing settlement. Formerly there were five or even six parties to every real settlement. This arose from the circumstances that it was then usual to have not merely one but four sets of trustees—one for the general purposes of the settlement, one for the purpose of securing the pin-money, one for the purpose of securing the jointure, and one for the purpose of securing the portions. The reason that one set of trustees was not enough for the three last-mentioned purposes was because pin-money, jointure, and portions had then all to be secured by means of terms, as portions are secured now (see *infra*, p. 171), and if three different terms were vested in the same persons, they would at law merge; though since they were held on different trusts, there would be no merger of them in equity (see Strahan's Law of Property, p. 71). As will be seen, it is now no longer necessary to create terms to secure pin-money or jointures, or any other annual charge (see *infra*, p. 160), and even

if it were, there would be no necessity for vesting each of such terms in a different set of trustees, since now by s. 25 of the Judicature Act, 1873, where there is no merger in equity, there is none in law (*Snow v. Boycott*, [1892] 3 Ch. 110). Sect. 3.

Recitals are not infrequently omitted in settlements, and in the form in which they are usually drawn, they can hardly be said to serve any useful purpose. They are generally in the short form given in our precedent (*supra*, p. 145), which merely recites the intended marriage and the fact that the settlors are entitled to certain property, without in any way deducing the title to such property from any root. Then follows a recital of the intention to settle this property to the following uses. In such form they only give a bird's-eye view of the object and subject-matter of the instrument, which may prove of value in cases such as the foregoing example, where by the same instrument, property belonging to different parties is settled on different limitations.

With regard to the operative words, the only point of any importance is the character in which the husband is expressed to convey. As marriage is in law a valuable consideration, some conveyancers contend that he should convey as "beneficial owner." In this case, the recital of title would be set out in the same manner as in a conveyance on sale (*supra*, p. 60). In spite, however, of the technical consideration supporting a marriage settlement, it is the commoner and, it is submitted, wiser practice to express that the husband conveys as "settlor" only. The only covenant on his part which will then be implied, will be a covenant for further assurance (*supra*, p. 69). If he is expressed to convey as beneficial owner, all the covenants implied in an ordinary conveyance on sale would be implied (see Hood and Challis's *Conveyancing and Settled Land Acts*, p. 42), and accordingly if his title proved

**Sect. 3.** defective, not only might the property settled by him be lost to him and his family, but his trustees might find themselves compelled to waste other trust funds, and further to compromise his position, by bringing an action against him for damages for breach of the covenants for title—a proceeding hardly calculated to advance the object of the settlement.

If the settlement is post-nuptial and therefore voluntary, and the settlor is expressed to convey as settlor, the covenant for further assurance will be implied, but even should he be expressed to convey as “beneficial owner,” no other covenants would be implied since s. 7 (A.) of the Conveyancing and Law of Property Act, 1881, applies only to conveyances for valuable consideration. Where it is wished to import into a post-nuptial settlement, covenants for title, such as the words “beneficial owner” imply in a conveyance for value, this must be done by expressly entering into them or by introducing them by an express reference to s. 7 (A.) of the Act.

**Habendum.** The great difference between a conveyance by way of purchase, and a conveyance by way of settlement, begins with the habendum. Till this comes, the difference is small at all times, and sometimes there is none at all. But with the habendum, the two instruments diverge entirely, and the different objects they are intended to accomplish become clear. Not only so, but different principles become applicable. The conveyance by way of purchase is a common law conveyance which deals on common law principles, with the ownership legal and beneficial. The conveyance by way of settlement is a conveyance by way of use, which deals only with the beneficial ownership on equitable principles, and leaves it to the Statute of Uses to transfer the legal ownership.

It will be seen that the habendum is merely “to hold the same unto the said trustees in fee simple,” not as in a

Sect. 3.  

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conveyance on sale "to hold the same unto and to the use of," etc. This, as has already been pointed out, would make no difference in the operation of the instrument if the trustees gave value for the land conveyed (*supra*, p. 81). But though a settlement in consideration of marriage is a conveyance for value, the trustees are volunteers under it: whatever value is given by the marriage consideration, is given by the husband and wife and the issue of the marriage. These alone are said to be within the marriage consideration (see *De Mestre v. West*, [1891] A. C. 264). Accordingly the Statute of Uses operates on the settlement and conveys the legal estate—where the estate settled is as here a freehold—not to the trustees who take nothing under the settlement—but to the persons to whom the beneficial ownership or "use" is limited. If it is intended that the trustees shall take the legal estate, as it sometimes is, the operative words are "to hold the same unto and to the use of the trustees in fee simple" upon *trust*, etc. (*supra*, p. 29).

The uses are then set out, and the very first of these shows us that the principles of limitation applied are not the old common law principles. The first use is, "To the use of the said John Doe and his heirs until the said intended marriage," etc. That is, it is a fee simple subject to a condition which may determine it an hour after it is created. Now such a limitation might at one time be good at common law since the condition which may determine it is one that might never happen (Co. Litt. 27 a). But whether it could subsist at common law or not, it is certain that at common law no estate could be limited to follow it (*supra*, p. 126). Here, however, estates are limited to take its place the moment it is determined by the settlor's marriage.

(1) Determinable fee simple.

The effect, then, of the first limitation of use is to continue the settlor as owner in fee simple of the land



**Sect. 3.** settled subject to an executory limitation over on the solemnization of the intended marriage.

It may be noted that by marriage here is meant a valid marriage in law ; and, accordingly, where there can be no such marriage, as where the intended union is with a deceased wife's sister (*Pawson v. Brown*, 13 Ch. D. 202), the executory limitations over can never arise. Sometimes a clause is inserted among the covenants and conditions in the settlement, that if the marriage does not take place within a year from the execution of the settlement, the limitations over are to become void. But as the execution usually takes place so immediately before the time fixed for the marriage as to allow the parties no *locus penitentie*, such a clause is seldom useful.

(2) Pin-money.

The first use limited after the intended marriage is to secure the wife a certain allowance as pin-money. As has already been said, the practice formerly was to secure the wife's pin-money by means of a term limited to trustees in the mode in which portions are now secured. This was done partly because of the wife's incapacity at common law to own property or bring actions independently of the husband, and partly because the remedies given for rent-charges were not so effective as they now are. The wife's incapacity is now abolished by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), absolutely (for present purposes) as to women married since December 31st, 1882, and as to women married before January 1st, 1883, in respect of property accruing to them since December 31st, 1882. By ss. 1, 2, and 5, a married woman is entitled henceforth to hold and dispose of property without the intervention of a trustee as if she were a *feme sole* ; and by s. 12 she can bring actions against all persons whatsoever, including her husband, for the protection of her separate property. While by s. 44 of the Conveyancing and Law of Property Act, 1881, as we have

seen, ample facilities have been given for recovering annual sums charged on land (*supra*, p. 99). Sect. 3.

The pin-money is usually granted to the wife for her separate use without power of anticipation. These expressions will be considered more conveniently when we come to discuss the trusts of the wife's own property (*infra*, p. 204).

Subject to the charge for the wife's pin-money, the land is limited to the husband for life. When the husband is himself the settlor it is the almost invariable practice to make him unimpeachable for waste. (3) Life estate.

Two questions of great importance arise in connection with this limitation of the life estate. The first is the statutory powers conferred upon the life tenant by the Settled Land Acts, and the second is the law as to waste.

First, then, as to the powers conferred by the Settled Land Acts. To understand these it is necessary to understand the custom of entailing and re-entailing land which led to the mischiefs which those Acts were designed to cure. As we have seen (*supra*, p. 136), the rules of limitation permitted land to be limited only to persons living at the date of the settlement and the children of such persons, or in the alternative (*supra*, p. 141) to persons living at such date and persons coming into existence within twenty-one years of the death of such persons. No doubt the object unconsciously of the first of these rules and consciously of the second was to prevent the fee simple of the land being kept permanently in practical abeyance by the creation of a series of life estates extending over a multitude of unborn generations of men. But the object of both rules was frustrated by a dexterous manipulation of the rules themselves worthy of the noblest traditions of the family lawyer. The Settled Land Acts.

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Settlement  
and resettlement.

The process adopted by these gentlemen to bring about this purpose was as follows :—They settled the land on the living person for life, and on his death to his eldest son in fee tail, with remainder in tail to the other sons, and sometimes to the daughters, with the ultimate remainder in fee simple to the settlor. Now the effect of this was, that as long as the settlor lived, the eldest (or succeeding) son, no matter what age he attained, derived no profit out of the land except with his father's consent. And more, without such consent he could not effectually bar the entail (*supra*, p. 24). All he could do was create a base fee in succession to his father's life estate liable to come to an end on the failure of his (the son's) issue—an estate barely marketable at any rate at the time when he attained his majority, at which period, in ordinary cases, his father would still be in the prime of life. Thus at that time the father controlled the situation, and could dictate the terms on which he would agree to give the son an income out of the land during their joint lives. These terms usually took the form of an agreement on the son's part to join with the father in barring the entail and resettling the land on the father for life "in restoration and by way of confirmation of the life estate of the said" father, limited to him by the previous settlement, with remainder to the son for life and remainders to the son's eldest and other sons in succession in fee tail, with remainder in fee simple to the son. This agreement was formerly carried out by a recovery (*supra*, p. 23), and is now accomplished by a conveyance of the settled land by father and son to a grantee to uses "To hold the same unto the said 'grantee' and his heirs discharged from all estates in tail of the said 'son' at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail. To such uses" as the father and son shall jointly appoint, and in default of and subject to such appointment to the father for life, and then to such uses

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s the son shall appoint, and in default of such appointment to the uses of the old settlement. Then by a subsequent instrument the power of appointment is exercised to create the new settlement above outlined.

This mode of defeating the object of the rules against perpetuities and double possibilities by a strict observance of them was, it is said, devised by Sir Orlando Bridgman during the leisure from practice in the law courts afforded to him by the establishment of the Commonwealth. It rapidly took root as a custom until there was scarcely a single considerable property in the country which was not resettled the moment the first tenant in tail under the previous settlement was of age, and so able to bar the entail and resettle. The consequence was that there never was for any length of time a greater interest than a life estate subsisting in any living person of full age, and so there was no one capable of conveying the fee. The Settled Land Acts were passed to remedy this state of things by conferring "upon the present generation of landowners the means of alienation which they had become deprived of in the process of time by the ingenuity of conveyancers and to enable tenants for life of settled land to sell, partition, lease, and otherwise dispose of settled land freed from the restrictions which by the general law previously existing and by the numerous statutes applicable to the subject, had at the time of passing the Act prevented tenants for life from so dealing with the settled land" (*In re Clitheroe*, 28 Ch. D. 378).

Object of  
Settled Land

It is not possible in an elementary work such as this to go at length into the elaborate provisions of the Settled Land Acts of 1882 to 1890. Neither is it within the scope of the work to do so. The provisions of those Acts must be accurately known by every one who aspires to be an accomplished conveyancer, just as all the incidents of a fee simple, or fee tail, or life estate, must be known. But

**Sect. 3.** they are, as are the latter, more properly treated of in a treatise on the Law of Property than in one on conveyancing. In most works for students on that subject there is a synopsis of them which may be useful to a beginner (*e.g.*, Strahan's Law of Property, p. 58).

Powers of  
life tenant  
under Settled  
Land Acts.

From the draftsman's point of view the important thing is that the Acts give a tenant for life within them sufficient powers of dealing with the land settled to make it as a rule not necessary now, as it formerly was, to insert in the settlement any express powers for this purpose. The practical effect of the Acts is to give the tenant for life all the powers over the land settled—whether this is the fee or a smaller interest—which the absolute owner of it would have subject to this, that he shall use such powers as a trustee for the whole of the persons interested in the land settled, and to ensure that he does so the Act makes it a condition precedent to the exercise of those powers that there shall be trustees of the settlement entitled to call on the court to interfere, and that all the money other than income resulting from his exercise of the powers shall be paid to such trustees or into court. This money (called “capital money” in the Acts) is then regarded as representing the settled land so sold, and all the limitations of the settlement apply to it. It may at the option of the life tenant be re-invested in land or in other investments in which trust funds can be lawfully invested, or it may be expended in improvements within the Acts of other lands settled to the same uses, even though those other lands are in England, while the land sold is in Ireland, or *vice versa* (*In re Eyre Coote, Coote v. Cadogan* (1899), W. N. 222). The purchaser takes free from all the limitations of the settlement whatever interest in the land was settled, whether that interest was the fee simple or merely a leasehold.

The practical effect, as has been said, is to give the life tenant the powers of an absolute owner of the lands settled.

**Sect. 3.**  

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This, of course, is subject to some limitations, and with regard to these it is necessary in some cases to extend the powers given by the Act. This can be done very simply by a clause incorporating the powers in the Act, enlarged as the draftsman desires. Then, under s. 57 of the Act of 1882, these will be read as if they were powers conferred by the Act itself.

The points upon which an enlargement of the life tenant's powers is most often desirable are as follows: Most usual enlargements of powers under Settled Land Acts. A tenant's power of leasing is confined to granting a building lease for ninety-nine years, or a mining lease for sixty years, or any other lease for twenty-one years (s. 6). Now, in the case of mining, and more especially of building leases, it is in some districts customary to grant longer leases than these and under the Settled Land Acts these longer leases cannot be granted without the consent of the court (s. 10). Where the settled land lies in such a district it is desirable to enlarge the life tenant's leasing powers so as to enable him to grant leases according to the local custom without putting him to the expense of applying to the court for leave. Again, the life tenant's power of leasing, selling or exchanging the mansion house and lands usually occupied therewith cannot be exercised without the consent of the trustees or an order of the court (s. 10, Act of 1890), and sometimes the statutory power is enlarged to give him a free power of leasing (at any rate). A free power to sell or exchange is seldom desirable now in view of the definition of principal mansion house in the Act of 1890, which excludes therefrom any house which is usually occupied as a farmhouse or the site of which "and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres." As chattels settled to accompany the inheritance, or heirlooms as they are properly called, cannot be sold by the life tenant without the sanction of the court (s. 37, Act of 1882), the statutory power with regard to them is also occasionally enlarged.



**Sect. 3.** Again, the Acts give the life tenant no power to raise capital money by mortgage for the purpose of improvements upon the settled lands, and sometimes such a power is given by the settlement where the situation or nature of the settled lands makes it likely to prove useful. And in connection with improvements a clause is often inserted substituting the consent of the trustees for that of the Board of Agriculture which the Acts require as a condition precedent to the expenditure of capital money upon them. And sometimes a clause is put in to enable a single trustee to receive purchase and other capital money arising from the exercise of the tenant's powers (s. 39 Act of 1882), and a few other express additions to the statutory condition of things are sometimes inserted, one or two of which will be noticed later. But, generally speaking, most of these additions are necessary only in exceptional cases, and where it is not clear they will be wanted it is better they should not be inserted.

**Powers  
personal to  
life tenant.**

The statutory powers, though conferred on the life tenant in virtue of his life estate, are not incidental to his estate (*In re Mundy and Roper's Contract*, [1899] 1 Ch. 275). They are personal to himself and continue in him after he has alienated his life estate (s. 50 (1)), though, of course, he cannot then by the exercise of them prejudice or defeat the interest of his alienee (s. 50 (3)). And the powers are vested in the tenant for life, notwithstanding any provision to the contrary in the settlement, and any condition intended to restrain his exercise of them is void (s. 51 (1)), as is a contract by the life tenant himself not to exercise them (s. 50 (2)). Wherever, then, there is a settlement within the Settled Land Acts, 1882 to 1890, and a life tenant within them (see s. 58) the latter is entitled to exercise, and nothing in the settlement can prevent him from exercising, the powers given to him by these Acts, subject, of course, to the conditions and limitations imposed by the Acts themselves.



While, however, it is impossible to exclude these powers where there are a settlement and a life tenant under it, it is possible by various devices to render their exercise by the life tenant difficult, or by having no life tenant to leave nobody to exercise them.

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Two devices are used for the purpose of rendering the exercise of the statutory powers difficult. The one is the simple device of appointing no trustees for the purposes of the Acts and no trustees with any power of sale over any part of the lands settled (s. 2 Act 1882 and s. 16 Act 1890). This device is readily got over by an application to the court to appoint trustees for the purposes of the Acts under s. 38, Act 1882. A somewhat stronger device is that of limiting the land on trust for sale and giving the trustees a discretionary power to postpone the sale, the understanding being that they will postpone it “generally,” as lawyers say. Now, while a power of sale in the trustees enables the life tenant to exercise his powers freely, a trust for sale in them prevents his exercising them without the leave of the court (s. 7, Act 1884); and as the trustees will probably oppose the application for leave it may prove expensive to the life tenant to obtain it and still more so to have it refused. This device is especially in favour with those thrifty testators who wish to tie up half-a-dozen small houses which they have purchased with their savings as tightly as if they were ancestral estates supporting the dignity of a dukedom. Neither of these devices is, however, of much avail when the property settled is considerable. In such case the only certain way of preventing the exercise of the statutory powers is by abolishing the life tenant. That is done thus :

Clogs on  
exercise of  
powers.

The land intended to be settled is vested in trustees with power to sell, lease, and manage it. The first beneficiary, instead of taking a life interest in the rents and profits, is

Excluding  
statutory  
powers.

**Sect. 3.** given an annuity (equivalent as nearly as possible to the average rents and profits) which is charged upon the annual rents and profits. The balance of the rents and profits after payment of the annuity is directed to be accumulated and added to the corpus of the estate. A direction is inserted that the trustees, at the request of the first beneficiary, shall demise to him the mansion house, lands occupied therewith, sporting rights, etc., at a rent therein set out, on a lease for years determinable with his life. Here, as long as the direction to accumulate the surplus income stands good, there is no tenant for life within the Settled Land Acts of the settled property ; but once it fails the person entitled to the surplus rents becomes tenant for life.

Directions to  
accumulate  
income.

The objection to this settlement from the point of view of excluding the Settled Land Acts lies in the liability to failure of the direction to accumulate. Such directions are within the Thellusson Act and the Accumulation Act, 1892. By the first of these Acts accumulations can be validly directed only for one of these alternative periods : (1) the life of the settlor ; (2) twenty-one years from the death of the settlor ; (3) the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor ; (4) the minority or respective minorities of any person or persons who, under the settlement, would for the time being be, if of full age, entitled to the income directed to be accumulated. By the latter Act when there is a direction that the surplus income shall be invested in the purchase of land the period of accumulation is restricted to the last-mentioned period. Accordingly, it would seem that when the settlor himself was the first beneficiary—as he is in the foregoing precedent—the powers of the Settled Land Acts would be effectually excluded under the above settlement during his life unless there was a direction to invest the accumulations in land where the powers would vest in the

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first son of the marriage who attained the age of twenty-one, whether the settlor was then living or not. If the settlor was not the life tenant himself then the accumulation would be good during any of the alternative periods, subject, again, to the provisions of the Act of 1892.

The Acts restraining accumulations do not apply to trusts to accumulate for the payment of debts or portions (s. 2); nor to directions as to timber and wood on the land settled. These are regulated by the ordinary rule against perpetuities (*supra*, p. 141).

The second point arising in connection with the limitation of the first life estate in the foregoing settlement, is with respect to waste. Where the settlor is himself the first life tenant it is the almost invariable practice to make him unimpeachable for waste. This, however, still leaves him liable for equitable waste, or the unconscionable use of his legal right to commit waste (*Lord Barnard's Case*, 2 Vern. 738); and accordingly, sometimes where the settlor is anxious to be in a position to manage his own land in whatever way he thinks best without outside interference, he objects to this. To relieve him from it it is necessary to state in the settlement that he is to be not merely "not impeachable for waste," but "not impeachable for waste whether the same be legal or equitable."

One of the most curious provisions of the Settled Land Act, 1882, is in reference to waste. By s. 11, where mining leases are granted by the life tenant under the powers given by the Act, the tenant is entitled, if he is impeachable for waste, only to one-fourth, and if he is not impeachable for waste, to only three-fourths of the rent reserved on the leases, the balance in each case being considered capital money under the Acts. Waste and mining lease

Now at common law a life tenant impeachable for waste could work, in the manner they were then worked, all the

**Sect. 3.**        mines open at the time the settlement was made (*Spencer v. Scurr*, 31 Beav. 334), and if he were unimpeachable he could work all mines whether then open or not, and in any way he liked ; and in each case the whole profits of working them belonged to him. If he leased them according to his powers as life tenant, or if they were leased by his predecessor in title according to his powers (*Re Kemeys-Tynte*, [1892] 2 Ch. 211), he could, in the same way, take all the rent or royalty payable. These rights and powers seem not to be interfered with by this section ; but a kind of penalty is attached by it to the grant of a mining lease when such grant is made under the powers given by the Settled Land Acts. When the grant is so made, then, even though the lease be of an open and working mine, the life tenant receives only one-fourth of the rents, if he is impeachable for waste, and if he is not impeachable for waste, he receives three-fourths. This seems rather objectionable, more especially in the case of a tenant not impeachable for waste, and so it often happens that express words are inserted in such cases, enabling the life tenant to grant leases of sixty years, and at the same time to receive all the rent and royalties reserved on them, as is done in the foregoing precedent (*supra*, p. 148).

(4) **Jointure.** The wife's jointure is the use set out immediately after the husband's life estate. Strictly speaking, by a jointure is meant "a competent livelihood of freehold for the wife of lands or tenements, etc., to take effect presently in possession or profit, after the decease of her husband, for the life of the wife at the least, if she herself be not the cause of determination or forfeiture of it" (Co. Litt. 36 b). By 27 Hen. 8, c. 10, such a jointure when conferred upon the wife before marriage was sufficient to bar, on her husband's death, her claim to dower out of the heritable lands which had been his at his death or at any time during their coverture. Dower being now very easily barrable

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under the Dower Act, 1833 (3 & 4 Will. 4, c. 105), the question whether or not a jointure is good within 27 Hen. 8, c. 10, seldom arises, and the term is applied to any provision made by a settlement for the support of the wife in case she survives her husband.

In settlements made in contemplation of a particular marriage the provision now usually takes the form set out in the foregoing precedent : that is, the form of a charge to the wife by name of a definite annual sum upon the settled property. Where, however, the settlement is not made in contemplation of a particular marriage—as when an eldest son joins in resettling a family estate immediately on his coming of age—or where the settlement is made by a testator for the benefit of the life tenant and his family, the provision may take the form either of an annuity to, or of a power to charge the estate with an annuity in favour of, the life tenant's "wife." In such case questions sometimes arise as to who is within the provision. The general rule seems to be that if the life tenant was married at the date of the settlement, his then wife is the only wife to whom he can appoint, or who is entitled to a jointure ; but if he was not then married he may appoint to any wife, or any wife is entitled, whether she be a first wife or not, provided she survives him (*Peppin v. Bickford*, 3 Ves. 570). Slight indications will be sufficient even when the life tenant was married at the date of the settlement, to show that by "wife" was meant, not merely his then wife, but any future wife who survived him (*Re Drew, Drew v. Drew*, [1899] 1 Ch. 336). In properly drawn instruments such questions as these should not arise.

After the jointure comes the term to the trustees to secure the portions intended as provision for the younger children. This term is limited as the jointure and pin-money were by way of use. Such being the case, two points are to be noted in regard to it. In the first place,

(5) Portions term.

**Sect. 3.** — such a term cannot arise by way of use unless by way of bargain and sale, *i.e.*, unless the use is based upon valuable consideration (*supra*, p. 14). Here the use is based on valuable consideration ; the younger children are within the marriage consideration, and the trustees take the term on their behalf. In the second place, being limited by way of use, the Statute of Uses passes the legal title in the term to the trustees without their making entry upon the land. In other words, the trustees take a complete and not an inchoate interest under the use, the legal term and not an *interesse termini* (*supra*, p. 26). Accordingly, their term cannot be defeated by an alienation for value of the freehold by the tenant in tail before they have taken possession under it, to a purchaser for value without notice of it as an *interesse termini* might be. They have a legal interest, and not merely a right to a legal interest in the settled land, and so questions as to valuable consideration and notice cannot arise.

‘ Satisfied terms.’

The term is limited to the trustees for the purpose of securing portions for the younger children. These portions, as we shall see, are usually raised and paid by the eldest son without the term being dealt with in any way, and when this is so the purpose of the term is fulfilled, and the term is said to be “satisfied.” Formerly, if it were intended that the term when it was satisfied should come to an end, it was necessary to put into the limitation of the term a “proviso for cesser,” *i.e.*, a clause providing that on the purposes of the term being fully executed it should cease. If there were no such clause the satisfied term became attendant on the inheritance, *i.e.*, the trustees held it for the benefit of the eldest son or other person entitled to the inheritance. This was sometimes an advantage in case of a sale of the inheritance. In such cases the purchaser took a conveyance of the freehold while the satisfied term was assigned to trustees for him. The object of this was to protect him against any undisclosed incum-



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brance upon the freehold created subsequently to the term. Against such incumbrance the purchaser could rely on his term, which having been created before the incumbrance gave him a prior title to the possession of the land.

Since December 31st, 1845, it has become unnecessary and useless to insert provisoes for cesser in the limitation of portions terms, as by the Satisfied Terms Act, passed that year (8 & 9 Vict. c. 112), every such term on becoming satisfied immediately determines. As to when a term is "satisfied" within this Act, see *Anderson v. Pignet*, 8 Ch. App. 180.

Subject to the jointure and the portions term the freehold is limited immediately on the life tenant's death to his first son in fee tail. The only point to be noted with regard to this limitation is that it is an instance of the fact referred to in discussing the common law rules of limitation that in limiting the freehold no attention is paid to the existence or non-existence of chattel interests in the land (*supra*, p. 127). Here, the first interest limited to follow the life estate is a chattel interest—the portions term. But its existence does not in any way postpone the fee tail limited to the life tenant's first son. The fee tail arises immediately on the determination of the life estate, and though the term, being limited in precedence to the fee tail, entitles the trustees to possession of the land before the first son, yet from his father's death the son is the freeholder, however barren his freehold may in fact prove. <sup>(6) Estates tail.</sup>

In the foregoing precedent the ultimate limitation of the fee simple to the settlor follows immediately upon the limitation of the fee tails to the sons. Often, however, there are interposed limitations to the daughters in default of sons of the marriage. Such limitations sometimes take <sup>(7) Remainder in fee simple.</sup>



**Sect. 3.** the form of successive estates in tail male to the first and other daughters similar in all respects to those limited to the sons. When this course is adopted, there is usually inserted among the other provisions in the settlement, a “name and arms clause”—that is a clause requiring every female taking for life or in tail as a purchaser under the settlement to adopt the settlor’s name and arms on pain of forfeiting the estate taken. More frequently, however, the limitations in favour of the daughters take the form of limitations to them in fee tail as tenants in common in cross remainder. These are usually expressed thus:—

remainders.

To the use of all the daughters of the said John Doe by the said Rosa Roe and the heirs male of their respective bodies as tenants in common in equal shares And if and so often as there shall be a failure of issue male of any such daughter then as well as to her original share as to any share or shares which shall have accrued to her, or to the heirs male of her body by virtue of this present limitation To the use of the others of such daughters and the heirs male of their respective bodies as tenants in common in equal shares And if there shall be a failure of issue male of all such daughters but one or if there shall be but one such daughter then as to the entirety of the same premises to the use of such one or only daughter and the heirs male of her body.

Section 51 of  
Conveyancing  
Act.

It will be remembered that under s. 51 of the Conveyancing and Law of Property Act, 1881, fees simple and fees tail may be limited as “fees simple” and “fees tail” and without the old common law words of inheritance “heirs” and “heirs of the body” (*supra*, p. 80). In the foregoing clause and precedent, the old form has been adhered to in all the limitations except the ultimate remainder in fee simple. This is a practice very commonly followed by conveyancers. There is, however, some very small advantage in point of brevity in adopting the statutory words, and if they are adopted, it is well to

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observe them throughout the settlement. When adopted for the words “and in default of such issue” (which are inapplicable when no mention is otherwise made of issue) should be substituted “with remainder.”

After the limitation of the ultimate fee simple come the provisions as to portions for the younger children. Some conveyancers begin by defining younger children, then set out the amount of the portions to be raised, then charge them upon the settled land with the usual hotchpot maintenance and advancement clauses. They then set out separately the trusts of the term which are confined to powers to raise the portions charged on the lands and the annual sums (if any) required for maintenance (see *Prideaux*, 17th ed., vol. 2, p. 373). The more usual practice, however, appears to be that adopted in the foregoing precedent—that is to set out all provisions concerning the portions by way of trusts of the portions term. Provision of portions.

When the latter course is followed the declaration of such trusts is commenced as in the foregoing precedent (*supra*, p. 146) by defining the phrase “younger children.” This is done with the object of ensuring the exclusion from the class entitled to portions of a son, who, though a younger child in the sense that he is not the first born, yet succeeds under the settlement to the settled lands, and also of every younger child, who, being a son, does not live to be twenty-one, or who, being a daughter, does not live to that age or marry. The latter object is attained easily enough; but it is not easy to attain the former entirely. Most conveyancers are content to exclude the younger son who becomes during his minority the tenant in tail in possession or in remainder immediately expectant on the life estate. This admits a second or other son, who attains twenty-one and afterwards becomes the heir by the death of his elder brother or brothers without issue. This, however, will cause little harm should such event occur Trusts of portions term.  
“Younger children.”

**Sect. 3.** before the son's share in the portions fund becomes absolutely vested, since it is a rule of equity that in such an instrument as a marriage settlement where land is settled on the "eldest son," and portions are provided for "the younger children" "eldest son" means the son who is entitled under the settlement to the settled land at the period of distribution of the settled funds and "younger children" include all the children except him (*Collingwood v. Stanhope*, L. R. 4 H. L. 52) unless the terms of the instrument show clearly that he was to be included in any event (*In re Prytherch, Prytherch v. Williams*, 42 Ch. D. 590). Thus an appointment of a share in the portions fund to a younger son, who during his father's life became the eldest living son, was held to be invalid on that event happening (*Chadwick v. Doleman*, 2 Vern. 528), while, on the other hand, the representatives of an eldest son entitled in succession to his father to a life tenancy with remainder to his eldest and other sons who died after reaching twenty-one in the lifetime of his father, leaving only female issue, were held to be entitled to a share of the portions fund in default of appointment (*Ellison v. Thomas*, 2 Dr. & Sm. 111, and see *Davies v. Huguerim*, 1 H. & M. 730). And in the same way a daughter who is the eldest child by birth is a younger child for the purpose of sharing in the portions fund, when she does not succeed to the estate under the settlement (*Pierson v. Garnet*, 2 Bro. C. C. 38).

**Powers of trustees.**

Then follow the powers given to the trustees of the settlement to enable them to raise the portions. It is the invariable practice to declare that during the life of the tenant for life these powers shall not be exercised except at his request in writing. After his death they may be exercised at such times as the portions become payable. Frequently, however, they are not exercised at all, the tenant in tail himself raising the money in whatever mode is most convenient to him, and on doing so, the trustees

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and the younger children join in surrendering the term to him. The term then merges in his freehold and he can re-settle the settled lands or sell them free from all incumbrances as far as portions are concerned.

Where the term is dealt with by the trustees for the purpose of raising the portions, they may either mortgage it, or sell it, or deal with it in any other reasonable way. Under recent legislation this practically gives them the power to sell or mortgage the fee simple itself (a). By s. 65 of the Conveyancing and Law of Property Act, 1881, and s. 11 of the Conveyancing Act, 1882, persons entitled either beneficially or as trustees to the possession of the land or to the receipts of the income under a term, can enlarge their term into a fee simple when :—

Enlargement  
of long terms.

(1) The term was originally one of at least three hundred years, two hundred of which are still unexpired.

(2) And it is not subject to any rent of money value (See *Re Chapman and Hobbs*, 29 Ch. D. 1007) ;

(3) And is not subject to any trust or right of redemption in favour of the freeholder ;

(4) And is not liable to be determined by re-entry for condition broken.

(5) And is not created out of any superior term not itself capable of being enlarged under these provisions.

When the term fulfils all these requirements, the owner or trustee may by deed declare to the effect that from and after the execution of the deed, the term shall be enlarged into a fee simple. The resulting fee simple is to be :

(1) Subject to all the same trusts powers executory limitations over rights and equities and to all the covenants

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(a) It should be remembered, however, that the long terms most usually enlarged are terms granted by way of mortgage by freeholders (see *infra*, p. 223).

**Sect. 3.** and provisions relating to user and enjoyment and to all the same obligations of every kind as the term would have been subject to if it had not been so enlarged ;

(2) Except that even where the original term was not created without impeachment for waste, it will include the fee simple of all mines and minerals which at the time of enlargement have not been severed in right or in fact, or have not been severed or reserved by an inclosure act or award (*b*).

Extent of  
portions fund

As to the amount of the portions fund, this is now usually fixed by the number of younger children. Where the settled land forms the only provision for both eldest and younger children, in order not to overburden the inheritance, the maximum extent of each younger child's expectant portion is usually in inverse proportion to the number of younger children. Thus, for example, the maximum portions fund would be fixed in this way : If there are not more than two younger children 15,000*l.* ; if not more than three, 20,000*l.* ; and if more than three 25,000*l.* Where, on the other hand, the settled land is intended primarily for the eldest son, and is drawn on merely as a supplementary provision for the younger children, whose main provision is to consist of the mother's fortune (as in the foregoing precedent) or of some other property, the maximum portion raisable for each younger child naturally varies according to the size of the family : the mother's fortune might, for instance, be an ample

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(*b*) This remarkable enactment has already been used by conveyancers for a purpose unforeseen when it was passed. It is used for the purpose of attaching incidents to a fee simple which could not at common law be attached to it. Where it is intended that a fee simple shall pass subject to these incidents a long term is granted containing covenants raising the incidents. Afterwards the lessee enlarges this into a fee simple. It is impossible to say as yet how far the incidents possible in case of a leasehold may not in this way be attached to a fee simple.

provision by itself for one younger child, while it might need much assistance from the settled land to make it sufficient for nine or ten younger children. Sect. 3.

The tenant for life is then given a power of appointment over the portions fund. A power of appointment is in itself the right of disposition over property separated from the other rights which together constitute the aggregate of rights called ownership. Where the property over which it subsists is personalty, the exercise of the power affects the equitable title to the property only. In other words, it consists then in the right to declare the trusts on which the property is to be held. Where, however, the property is freehold land, the exercise of the power may transfer the legal title according as the interest it creates is or is not a use coming within the purview of the Statute of Uses (*supra*, p. 9). Its exercise then creates springing and shifting uses carrying with them the legal estate, and the power is said to be a legal power of appointment. A common example of a legal power is seen in deeds to bar entails (see *supra*, p. 162). Power of appointment.

The power here given to the life tenant, or donee of the power, is a special power of appointment, that is a power to appoint not to whomsoever he pleases, but merely among the members of a certain class. Special powers were formerly divided into exclusive and non-exclusive powers, the former being powers to appoint to all or any of the class, and enabling the donee to exclude one or more of the class from any benefit in the fund ; the latter being powers simply to appoint among the class under which the donee had to appoint a share in law and a substantial share in equity to every member of the class. This distinction is now of little importance since the passing of 37 & 38 Vict. c. 37, which practically makes all powers henceforth exclusive, unless the instrument creating them expressly requires that a certain share shall be given to Exclusive and non-exclusive powers.



**Sect. 3.** each member of the class, or that none of the class shall be excluded. This Act applies to all appointments made after its passing (July 30th, 1874), whether the instrument creating them was executed after or before that date.

**Execution of power.**

Where the property settled is the husband's, the power of appointment is reserved to him exclusively ; where it is the wife's, it is usual to reserve it to the husband and wife jointly during their joint lives and then to the survivor (see *supra*, p. 150). It is exercised usually by a deed poll (see *supra*, p. 47). This deed will be a valid execution of the power if it conforms to all the formalities required by the instrument creating ; if it does not so conform, it will be valid only if it is executed and attested by two witnesses in the mode in which deeds are usually executed (22 & 23 Vict. c. 35, s. 12). This protection to appointments not executed in accordance with the requirements of the instrument creating them extends only to the *mode* of execution. It does not extend to acts necessary to enable the donee of the power to execute it, such as the consent of some third person to the appointment.

**Trusts in default of appointment.**

After the declaration of the settlor's power of appointment comes a declaration of the trusts of the portions fund which are to take effect so far as the settlor fails to exercise his power to appoint. Two points are to be noticed in connection therewith. In the first place, in badly drawn instruments—more especially in wills—sometimes a power to appoint is given without a gift over to the class intended to be benefited in default of appointment. Where such is the case, the court will hold that there is an implied trust for these where it is clear from the words used that what was intended primarily was to give the property to the class, and to give the donee of the power merely a right of selection of the particular members who should benefit by the gift. Where there is no indication of any intention to give to the class, then, on the failure of



the donee to appoint, there is no trust in favour of the class among whom he might have appointed (*Re Weekes' Settlement*, [1897] 1 Ch. 289). The second point to be noted is that in all well-drawn instruments the trusts in favour of the class contain a hotchpot clause.

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The custom of hotchpot originally obtained at common law with respect to lands coming to a daughter by descent and those she had received from her father in frankmarriage. “It seemed,” says LITTLETON, s. 267, “that this word (hotchpot) is an English pudding, for in this pudding is not commonly put one thing alone, but one thing with other things together. And, therefore, it behooveth in this case to put the lands given in frankmarriage with the other lands in hotchpot if the husband and wife will have any part in the other lands. And this tearme (hotchpot) is but a tearme similitudinary, and is as much as to say, as to put the lands in frankmarriage and the other lands in fee simple together ; and this is for this intent, to know the value of the lands, *scil.*, of the lands given in frankmarriage and of the remnant which were not given, and then partition shall be made in form following. As, put the case that a man be seised of 30 acres of land in fee simple, every acre of the value of 12 pence by the yeare, and that he hath issue two daughters, and the one is covert baron, and the father gives ten acres of the 30 acres to the husband with his daughter in frankmarriage, and dyeth seised of the remnant, then the other sister shall enter into the remnant, viz., into the 20 acres, and shall occupie them to her own use unless the husband and his wife will put the 10 acres given in frankmarriage with the 20 acres in hotchpot, that is to say, together ; and then when the value of everie acre is known, to wit, what every acre valueth by the yeare, and it is assessed or agreed between them, that every acre is worth by the yeare 12 pence, then the partition shall be made in this manner, viz., the husband and wife shall have

**Sect. 3.** besides the 10 acres given them in frankmarriage 5 acres in severalties of the 20 acres and the other sister shall have the remnant, *scil.*, 15 acres of the 20 acres for her propartie, so as accounting the 10 acres which the baron and feme have by the gift in frankmarriage and the other 5 acres of the 20 acres the husband and wife have as much in yearly value as the other sister.”

Whether, as LITTLETON asserts and Lord COKE very gently and politely denies (*c*), estates in frankmarriage are still possible, it is certain that they are now unknown ; but the principle of hotchpot which attached to them is still recognised by conveyancers—if not by the Legislature—as a just one, and it is introduced into all settlements to prevent any one of the younger children to whom a share in the portions fund has been appointed from claiming on his parent’s death a further share in the part unappointed without giving credit for the share already received. Usually power is given to the tenant for life to declare on making an appointment that the share appointed shall not be brought into hotchpot. This power may be of some slight convenience when his desire is to let the whole fund be divided equally among the younger children subject to a certain first charge in favour of a particular child.

(*c*) LITTLETON says : “ And note that gifts in frankmarriage were by the common law before the Statute of Westm. the Second and have been alwaies since used and continued etc.” To which COKE replies : “ By this *etc.* is to be understood that before the statute it was a fee simple and since the statute a fee tail. So as it is true that the gifts do continue (as our author here saith) but not the estates.” It is not clear what COKE means here. Possibly it is merely that a gift under the proper circumstances (see Co. Litt. 21 a) in frankmarriage (*in liberum maritagium*) without words of inheritance will now be sufficient to pass an ordinary estate in special tail (which seems good law to this day), or it may mean that it will pass an estate in special tail with those peculiarities characteristic of the old estate in frankmarriage (see Co. Litt. 22 a).

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After the hotchpot clause comes the maintenance clause. Its object is to provide maintenance for the younger children in case the life tenant should die before all of these have attained their majority. As we shall see, under the Conveyancing Act no such clause is now usually necessary where a fund producing income is settled on children contingently on their attaining twenty-one (*infra*, p. 208). A portions fund, however, can, of course, produce no income until it is raised, and it cannot be raised until the children have reached twenty-one, and so to provide maintenance this special clause must be inserted.

This clause, it will be noted, is directory—that is, the trustees have no option but to raise the annual sum set out. That annual sum is usually what would amount to four per cent. on one-half of the infant's share of the portions fund if he and the other children were then of full age. As we shall see, the power given by the Conveyancing Act is discretionary, and in cases where there is a settled fund other than the portions fund (as in the foregoing precedent) the trustees will use the income of such fund merely to supplement the portions charge. The mode, however, in which this annual sum is to be used is always left to the discretion of the trustees, and the purposes for which it is to be used are described not merely as the maintenance and education of the infant but also its “benefit.” Benefit is a word of very wide meaning, which is not limited by the preceding words “maintenance and education,” and its use practically gives the trustees a discretion to use the money in any way which may reasonably appear to be for the child's advantage. (See *Lowther v. Bentinck*, L. R. 19 Eq. 167.)

With regard to the advancement clause which follows, little need be said, as its terms explain themselves (see *supra*, p. 147). Its purpose, of course, is to enable the

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trustees to raise a lump sum during the minority of a child for the purpose of establishing him in a profession or business. During the father's life this can only be done at his request, and in the way he requests ; after his death the trustees have a discretion as large as they have in regard to maintenance.

When the amount of the portions fund depends on the number of children who attain twenty-one, the advancement clause also contains a provision that the money raised for advancement purposes is to be reckoned part of the portions fund only if the child advanced attains twenty-one, and so counts in determining the amount of the portions fund which can be raised. If such a provision were not inserted there would be a chance of all, or nearly all, the fund raisable ultimately being paid away as advancement to children who did not reach twenty-one, and so leaving those who attained that age altogether or practically without portions. Thus taking the facts to be as in the foregoing precedent, if in the event there were four younger children, the amount of the portions fund raisable on their all attaining full age would be 20,000*l*. Accordingly, before they attained that age, the expectant share of each would be 5,000*l*. Suppose three of them obtained half of their shares, that would be 7,500*l*. If these three died before attaining, and the fourth child alone attained, full age, then in the event 7,500*l*. would have been raised, and as the trustees' powers would thus be more than exhausted, no portion whatever could be provided for the surviving child. This, of course, is an extreme case, as here the portion provided, if only one younger child reaches full age, is exceptionally small ; but the same effect in a mitigated degree would be produced in the ordinary case where the size of a younger child's portion varies not with, but inversely to, the number of children.

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Sometimes a clause is inserted giving the trustees power to raise the portions fund, not as it is wanted, but all at once. The benefit of this arrangement is that it enables the trustees to secure all that can be wanted by a single mortgage or sale of the term. Where, then, it is highly probable that the fund will have to be raised by sale or mortgage such a clause is useful ; but where from the extent of the property settled or from other cause it seems likely that the fund may be raised without any dealings with the term, it is useless, and on the principle now so generally observed that no clause should be inserted unless it is likely to prove useful, it is now usually omitted.

Power to  
raise  
portions fund  
at once.

The last proviso of the portions term is that subject to the previous trusts the trustees are to permit the freeholder under the settlement to receive the rents and profits of the settled land. Its object is to prevent the trustees interfering with the tenant in tail in the management of the settled land further than is necessary to perform the trusts of the terms. Sometimes this is expressed to include the costs and expenses of the trustees in carrying out such trusts, but this is not necessary, since the trustees are by law entitled to a charge on the term of such costs and expenses. It is also usually drawn as to its closing words thus : "The rents and profits of the hereditaments to be received by the person or persons for the time being entitled to the said hereditaments in remainder immediately expectant upon the said term." This form is objectionable, if not from a practical at any rate from a theoretical point of view, since it assumes that the owner of the freehold, subject to the term, holds in remainder upon the term. This, however, as has already been pointed out, is not so (see *supra*, p. 127), and in a student's book, at any rate, it is desirable that this should be noted.

Freeholder  
to receive  
rents and  
profits sub-  
ject to trusts.

After the trusts of the portions term, two sets of clauses usually follow : first, clauses with regard to the powers of

**Sect. 3.** the trustees over the property, independent of the portions term; and, secondly, clauses giving powers to the life tenant in addition to those provided by the Settled Land Acts.

Trustees to  
be trustees  
under Settled  
Land Acts.

The first set of clauses is now very short. Usually it consists merely of one or two as in the foregoing precedent (*supra*, p. 148). The first object of these is to make the trustees of the settlement trustees for the purposes of the Settled Land Acts. As has already been pointed out, the tenant for life cannot exercise any of the larger powers conferred upon him by these Acts unless there are trustees for the purposes of the Acts. Trustees are trustees for the purposes of the Acts if they have a power of sale immediate, contingent, or future, or a power to approve or consent to a sale of the settled land, or of land settled under similar limitations (s. 2 Settled Land Act, 1882 ; s. 16 Settled Land Act, 1890). But as at the present time the powers of sale in a strict settlement are vested in the life tenant, it is the usual practice to appoint trustees expressly for the purposes of the Acts. This is now done simply by declaring the trustees of the term to be trustees for these purposes. The second object is to make the trustee of the settlement trustees for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881. This is done in the same way.

Trustees to  
be trustees  
for s. 42 of  
Conveyancing  
Act.

Who are  
trustees  
under s. 42.

In order to provide for the proper management of the settled land during any period when the person entitled under the settlement to the property was a minor, it was formerly necessary to give express powers to the trustees. The object of s. 42 of the Conveyancing and Law of Property Act, 1881, is to imply such powers in all settlements executed after that Act came into operation unless these are expressly excluded in whole or part by the terms of the settlement. The persons to exercise the implied powers are the persons appointed by the settlement for that purpose, or if there are none so



Sect. 3.

appointed, the trustees having a power of sale, or to consent or approve the sale, of the settled land or of part thereof, or if there are no such persons, then persons appointed by the court (*cf.* trustees for the purposes of the Settled Land Acts, *supra*). The powers given by s. 42 to these persons are as follows :—

(1) They shall manage or superintend the management of the land with full power to cut timber and underwood in usual course for sale, repairs, etc., and to erect, pull down, rebuild, and repair buildings, to continue working mines, etc., which have hitherto been usually worked, to improve the land, to insure against fire, to make allowances to and arrangements with tenants and others, and to determine tenancies and accept surrenders of leases, and generally to deal with the land in a proper and due course of management; but so that where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only and subject to the same restrictions on, and subject to which the infant could, if of full age, cut the same.

(2) They may use the income of the land which is to include the produce of timber and underwood sold, in paying all expenses arising out of the exercise of their powers, and all outgoings not payable by other persons, and in keeping down any annual sum, and the interest of any principal sum, charged on the land. This power, it is to be noted, applies only to the income. If it is necessary to raise capital money by mortgage or otherwise for these purposes, application must be made to the court (*Re Jackson, Jackson v. Talbot*, 21 Ch. D. 786).

(3) They may apply at their discretion any income to the maintenance, education, or benefit of the minor, or pay the same to the minor's parents or guardians for that purpose.



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(4) Any residue of income is to be invested in securities authorised by the settlement, if any, or by law for the investment of trust funds, and they may vary such investments. They are to accumulate the income of these investments in the way of compound interest, and shall stand possessed of the accumulated fund arising from the income of the land, and from the investments of income on the trusts following :—

(a) If the infant attains twenty-one in trust for the infant.

(b) If the infant is a woman, and marries while an infant, then in trust for her separate use independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge ; but—

(c) If the infant dies while an infant, and being a woman without having been married, then where the infant was under the settlement tenant for life, or by purchase tenant in tail, or tail male or tail female, on the trusts, if any, declared of the accumulated fund by the settlement ; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives as part of the infant's personal estate ;

but the accumulations or any part thereof may at any time be applied as if the same were income arising in the then current year.

These powers, so far as they relate to the land, may, where the minor's interest is an undivided share of the land, be exercised by the trustees in conjunction with the persons entitled to the other undivided shares.

**Sect. 3.**Usual  
modification  
of such  
powers.

The powers given by s. 42 are so ample when taken in combination with the powers given to the trustees by the Settled Land Acts during a tenant's minority that there is generally no need to attempt to enlarge them, and they are so beneficial that there is generally no desire to exclude them by any express provision in the settlement. There is one point, however, in regard to the trusts of the accumulated income which is sometimes objected to. In the event of the minor not living to receive this accumulated income if there be no direction in the settlement as to it, it goes to his personal representatives. In the case of a strict settlement this is rarely the intention of the settlor, and accordingly it is customary to direct that in the event of a minor entitled to an estate for life or in tail by purchase dying before becoming entitled to the accumulated income, the latter shall be treated as capital money under the Settled Land Acts, that is, as part of the corpus of the property settled. This direction is limited to minors taking estates for life or in tail by purchase, because an attempt to attach it to the estates of minors taking by descent would render the restriction void as contrary to the rule against perpetuities (see *supra*, p. 141). This same limitation must be attached to any express powers of management given to the trustees of the settlement. It is to be observed that s. 42 so limits the trusts as to the accumulated income, but does not apply any limit to the powers of management of the land. From this difference some have inferred that it is intended that the trustees of the settlement are to have the statutory powers even whether the minor takes the land by purchase or by inheritance. This conclusion is extremely doubtful ; there is, however, no decision as yet to resolve the doubt.

The second set of clauses which follow the trusts of the portions term are, as has been said, those giving the life tenant rights and powers over and above those given him by the Settled Land Acts. The rights and powers,

Additional  
powers giv  
to life tena

**Sect. 3.** however, given by those Acts, are so large that it is only in exceptional cases that they need any extension save on one point. Where the estate of the life tenant is not impeachable for waste, a clause should be inserted similar to that in the foregoing precedent (*supra*, p. 148), relieving him from the necessity put upon him by s. 11 of the Settled Land Act, 1882, of setting aside any part of mining rents or royalties as capital money (see *supra*, p. 169). The other points on which clauses adding to the powers given by the Settled Land Acts are most commonly needed have already been set out (*supra*, p. 165).

## SECTION IV.

## PERSONAL SETTLEMENT CLAUSES.

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WITH the second testatum commences the settlement of the wife's fortune. This settlement is not a real or strict settlement, but a personal settlement. It is a personal settlement not because the property settled, being leaseholds, is personalty, but because the trusts of the settlement show that the parties to the settlement intended to treat it as personalty. If the property settled had been freeholds the settlement would still have been a personal settlement since the effect of the trusts would have been to *convert* it for the purposes of the settlement into personalty.

*Conversion*, or "the notional change of land into money or money into land," is an idea upon which the whole Doctrine  
conversio

**Sect. 4.** nature of a settlement, whether by deed or will, is based. Practically the doctrine of equity as to it is shortly this, that where from the words or scope of the instrument it is clear that the settlor intended to deal with land as if it were money, or with money as if it were land, the court will regard the property settled as being from the moment the settlement comes into operation changed into property of the species intended (*Fletcher v. Ashburner*, 1 Bro. C. C. 497). Usually this intention is expressly stated in the settlement, as when there is a direction to sell freeholds and hold the proceeds upon certain trusts, or to invest settled money in the purchase of freehold lands. In such cases there is an express trust for conversion. But sometimes the intention to convert is only inferred from the nature of the limitations under the settlement, as where, after a direction to invest money in freehold land or securities, limitations are set out applicable only to realty (*Earlom v. Saunders*, Amb. 241). In whatever way the intention to convert may be gathered, once it is gathered the effect is that equity will, from the moment the settlement becomes operative, regard the property as being of the species into which it is intended to be changed, whatever its actual nature may then be.

Trust for  
conversion.

In the foregoing precedent there is, strictly speaking, no trust for conversion since the property settled being leaseholds is personalty, and therefore not changed in its legal character by being turned into money. But had the settled property been freeholds the trust for sale in the settlement would have caused a conversion immediately upon the execution of the settlement, and that in spite of the fact that the settlement clearly does not contemplate an immediate sale, since the trust to sell is only to be exercised during the lives of John Doe and Rosa Roe at their request in writing, and in spite of the further fact that no sale may in the event ever take place, since on the deaths of John Doe and Rosa Roe the younger children of

the marriage may elect to take the land itself. The trust for sale is important as showing that the land is to be regarded as personalty, and the effect of such a trust, however remote, always is to cause an immediate conversion, unless it is so remote as to be void as a breach of the rule against perpetuities (*Goodier v. Edmunds*, [1893] 3 Ch. 455).

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The object of the settlement of the wife's fortune in the foregoing precedent being to provide for the younger children of the marriage the trusts are framed so as to ensure that the wife's leaseholds and the husband's freeholds shall not vest in the same persons. Sometimes, however, it is desired to secure, as far as possible, that the leaseholds shall go with the strictly settled freeholds. When this is the case it is not usual to settle them upon a trust for sale, with directions to invest the proceeds in freehold land, save where it is intended that the leaseholds should really be sold. Where it is desired that there should be no sale, but that the leaseholds settled should accompany the freeholds, the leaseholds are assigned to the trustees who "shall hold the same premises upon such trusts, and subject to such powers and provisions as shall correspond with the uses trusts powers and provisions hereinbefore declared and contained concerning the freehold hereditaments hereby settled or as near thereto as the nature of the premises will permit but not so as to increase or multiply charges or powers of charging and so that the said leasehold premises shall not absolutely vest in any person hereby made tenant in tail by purchase unless he shall attain the age of twenty-one years but on his death under that age shall devolve in the same manner as if the same had formed part of the freeholds of inheritance hereby settled."

Leaseholds  
settled to  
accompany  
freeholds.

The only point in this clause which may need explanation is the direction that the settled leaseholds shall not

**Sect. 4.** vest absolutely in a tenant in tail by purchase who dies before attaining twenty-one. The leaseholds here settled to accompany the freeholds are not converted, and accordingly they are still personalty in law and equity. Now, it is a rule of law that a heritable interest cannot be created in personalty, and that words of limitation which would create an estate in fee or in tail in realty will convey the absolute interest in personalty (see Underhill and Strahan's Interpretation of Wills and Settlements, p. 160). Accordingly, if there were no such direction as this, the settled leaseholds would vest absolutely in the first tenant in tail immediately on his birth, and on his death they would go, not to the next tenant of the freeholds under the settlement, but to the personal representatives of the deceased tenant. Accordingly, if the first son of the marriage died an infant the purpose of the settlement would be frustrated, perhaps long before the death of the first life tenant. This result cannot altogether be prevented, since a direction that on the death of any tenant in tail the leaseholds should go to the next tenant of the freeholds, would be void for remoteness, as being applicable to tenants in tail by descent, and not confined to tenants who must take within twenty-one years after the death of the life tenant. Accordingly it is limited to tenants in tail by purchase during their minority ; and so on the death of any tenant in tail by descent, or of a tenant in tail by purchase, of full age who has not barred the entail of the settled freeholds, the latter will go to the heir of his body, or if he have none to the next tenant under the settlement, while the settled leaseholds will go under his will or to his next-of-kin.

Consideration  
and operative  
words,

Taking now the clauses of a personal settlement in the order set out in the foregoing precedent, it is to be noted that the consideration and operative words (when there are any) are the same as in a strict settlement. Usually, however, when the property in a personal



settlement is land there are no operative words, the land being conveyed to the trustees by a separate instrument. The chief advantage of this at the present time is that, on the sale of the settled land under the trust for sale, the settlement does not become a document of title to the land sold.

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—

When the conveyance is by separate deed the indenture is made between the same parties, and the consideration, the operative words, the habendum, and the trusts till marriage and for sale, are the same as in the foregoing precedent. Then the trusts of the proceeds of the sale are set out thus—

Conveyance  
to trustees by  
separate  
deed.

“ Upon the trusts and subject to the powers and provisions declared and contained concerning the same in and by an indenture already prepared intended to bear even date with and to be executed immediately after these presents and to be made between the same parties as these presents under which indenture the income of the said net sale moneys and the investments thereof and the rents and profits of the said hereditaments and premises until sale are payable to the said Rosa Roe during her life for her separate use without power of anticipation and after her decease to the said John Doe if surviving during his life.”

Then powers of management are given to the trustees with power to grant leases with the consent, or at the request, of the tenant for life, and provision is made for the appointment of new trustees in the same terms as in the foregoing precedent (*supra*, p. 151).

Returning to our precedent, the first matter that calls for special attention is the trust for sale. In connection with it, it may be well to say a word or two as to trustees' powers as to sales generally.

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Trustees'  
right to sell  
(1) At com-  
mon law.

Generally speaking, a trustee has as such no right to sell the trust property unless that power is given him expressly under the trust, or by all the *cestuis que trust*, or in particular cases by the law. But where he has the legal estate in him, if he sells in breach of trust to an innocent purchaser for value who does not know and has no reason to suspect that the sale is in breach of a trust, he passes a good title. This result arises from the operation of the equitable doctrine that where equities are equal, the law shall prevail. The *cestuis que trust* and the innocent purchaser for value have in the case given equal equities to the land—that is, they have equal rights in equity to it—but the purchaser has also the legal title. He accordingly is preferred.

(2) In equity. The trustee then can lawfully sell only when he has power to do so under the trust or by consent of the *cestuis que trust*, or in certain circumstances when the law gives him a special authority to do so. Dealing with these latter first, the cases where the law independent of statute permits or rather directs him to sell, is where the settled property consists of wasting interests, such as leaseholds or reversionary interests in personalty, and there is no direction in the settlement that the *cestuis que trust* entitled thereunder to limited interests, are to enjoy the settled property *in specie* (*Howe v. Dartmouth, Earl of*, 7 Ves. 437, 1 W. & T. Lead. Cas. 68). Cases under this head arise almost invariably under residuary bequests in wills, as settlements by deed nearly always contain specific provisions on the point. Where, however, whether in a will or settlement by deed, property of a wasting or reversionary nature is settled, under a general description, without any indication as to how it is to be enjoyed, it is the duty of the trustees to realise it, and pay the interest merely of the capital money to the *cestuis que trust*. This rule, however, applies only to personalty, and not to diminishing freehold interests (*In re Game, Game v. Young*, [1897] 1 Ch. 881).

Various statutory powers of sale have been conferred upon trustees. The most important of these for present purposes are (1) the case of the trustees of a settlement, where the tenant for life is an infant, when by s. 60 of the Settled Land Act, 1882, the powers of a tenant for life under that Act may be exercised on his behalf by the trustees of the settlement ; and (2) where a sale of settled land is to be made to the tenant for life, when by s. 10 of the Settled Land Act, 1890, the trustees are to stand in the place of and represent the tenant for life, and have in addition to their powers as trustees, all the powers of the tenant for life in reference to negotiating and completing the transaction. Two other statutory powers of sale given to trustees, but, like the right and duty of realising wasting personalty, concerning executors more than trustees of settlements are (1) power to sell part of the settled property to realise estate duty payable in respect of the Settled Lands (Finance Act, 1894, s. 9); and (2) power to sell a testator's or intestate's land for the purpose of paying debts his personalty is not sufficient to meet (Land Transfer Act, 1897, s. 2 (2) ).

Where the trustee sells at the request of the *cestuis que trust*, he acts merely as their agent to convey the legal estate. In order that he may be lawfully constituted their agent, all the *cestuis que trusts* under the settlement must be *in esse* and must be *sui juris*, and must join in the direction to sell. Conversely, where these conditions are fulfilled, the *cestuis que trust* are entitled if the trustee has power to sell, to interfere and prevent his selling. They are in fact the owners of the settled land, and have the same right as any other owners to decide what shall be done with it. But if any possible *cestui que trust* is still unborn, or if of those born any are not competent to join in selling property either through age or any other disability, or if any refuse to join in the direction to sell, the trustees can only act within the powers the law or the settlement gives them.

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(3) By statute.

(4) As agent for *cestuis que trust*.

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(5) Under  
express trust  
or power.

Where there is an express power or trust for sale, the trustees can sell only at the time and in the manner set out in the settlement. Thus, if the trust for sale is not to arise until the death of the life tenant, he cannot sell even with the life tenant's consent before that event (*Bryant v. Birmingham*, 44 Ch. D. 218). And an express power or trust for sale will entitle the trustees only to sell in the ordinary acceptance of that word—that is, to transfer the settled land for a lump sum of money paid on transfer. It will not justify an exchange of the land for other land, or a sale for a rentcharge. As to the mode of sale, it was formerly the practice to give the trustees express powers as to it; but the provisions implied by s. 13 of the Trustee Act, 1893, are now generally thought to allow trustees sufficient discretion. By that section, a trustee for sale may sell or concur with any other person in selling all or any part of the property either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract of sale and to buy in at any auction, or to rescind any contract for sale, and to resell without being answerable for any loss. These powers are implied only in so far as they are not excluded by the terms of the settlement, and only in settlement executed since December 31st, 1882. As to the law previous to this enactment, and the proper mode of proceeding when there is a joint sale, see *In re Cooper and Allen's sale to Harlech*, 4 Ch. D. 802.

Conveyances  
by trustees.

Trustees selling under a power of sale are expressed usually to convey “as trustees,” which implies under s. 7 of the Conveyancing and Law of Property Act, 1881, merely a covenant against incumbrances effected by themselves, as has already been pointed out (*supra*, p. 71). And, as has also been pointed out, it is customary for trustees selling as trustees to give merely an acknowledgment and not an

**Sect. 4.**  

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undertaking as to the documents of title in their possession (*supra*, p. 85). A married woman who is a trustee for sale cannot convey freeholds except by separately acknowledged deed and with the concurrence of her husband (*supra*, p. 89), though she can convey freeholds or copyholds vested in her as a bare trustee, as if she were a *feme sole* (Trustee Act, 1893, s. 16). A bare trustee in this connection would seem to mean a trustee whose sole duty is to convey as directed by the *cestuis que trust*, but see *Re Docwra, Docwra v. Faith*, 29 Ch. D. 693. Sometimes when the married woman is not a bare trustee within this definition, and it is impossible to secure the concurrence of her husband in the conveyance, conveyancers attempt to enable her to convey as a *feme sole* by getting the purchaser to pay the whole purchase-money to her before conveyance. On receipt of the purchase-money she becomes trustee for the purchaser, and as her sole duty as trustee is to convey to him, she is a bare trustee within s. 16 of the Trustee Act, and so able to convey as a *feme sole*.

As has already been pointed out, the existence of a trust for sale of the settled lands, has the effect of preventing the tenant for life of the income of the settled property exercising the powers given by the Settled Land Acts, without an order of the court under s. 7 of the Act of 1884 (*supra*, p. 167). The trustees, on the other hand, are empowered to exercise the powers given them by the settlement without the consent of the tenant for life, unless the settlement requires such consent (Settled Land Act, 1884, s. 6). Where it is desired that the life tenant and not the trustees shall exercise the powers of sale and management during his life, two courses are open to the conveyancer. He may, in the first place, give the life tenant a legal estate in the settled land during his life, and make the trust for sale to arise only on his death. Here the tenant for life would have all the powers of a life tenant under the Settled Land Acts. Or the powers

Trusts for  
sale and  
powers under  
Settled Land  
Acts.

**Sect. 4.** may be given to the trustees with leave to delegate them to the tenant for life. This is perhaps the preferable method wherever the express powers given are very extensive, or include the right to commit waste, since in case of the life tenant's bankruptcy, the powers remain in the trustees of the settlement.

The effect of an order under s. 7 of the Settled Land Act, 1884, is to transfer the power of sale from the trustees to the tenant for life of the income of the settled land, but only from the registration of the order as a *lis pendens*. Accordingly, in case of a purchase from trustees for sale under a settlement, a search should be made on behalf of the purchaser, for such an order.

Trust for  
investment.

Following the trust for sale comes the trust for investment. In the first section of the Trustee Act, 1893 (56 & 57 Vict. c. 53), is contained a list of the securities in which trust funds may be lawfully invested by trustees, unless the trust instrument forbids investment in them. Where, however, an immediate sale and investment is contemplated, it is the practice not to rely on these provisions, but to set out expressly in what securities the trustees may invest. This is done partly to save expense, by enabling the trustees to ascertain without legal assistance how they are entitled to invest money, and partly because it is sometimes difficult to ascertain whether a security is within the securities authorised by statute or not. But in case no sale of the corpus of the settled property is contemplated until the period of distribution, as in our precedent, there is no advantage in setting out at great length the securities in which the trust funds might be invested if there were a sale.

Trustee  
securities.

The chief of the securities authorised as investments for trust funds by s. 1 of the Trustee Act are, (a) Government securities of the United Kingdom ; (b) real or heritable



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securities in Great Britain or Ireland ; (c) stock of the Banks of England and Ireland ; (d) stock charged on the revenues of India ; (e) any securities the interest of which is for the time being guaranteed by Parliament ; (f) Metropolitan consolidated stock ; and (g) nominal or inscribed stock of a county council or of any borough with a population of over 50,000 at last census. As regards railway, canal, and waterworks company securities, the general principle followed by the Act is that trustees may invest in debenture, guaranteed, and preference stock of such companies, in the United Kingdom, only when there has been paid on the ordinary stock for the ten years preceding the investment a dividend of not less than three per cent. per annum. Trusts funds may also be invested in Indian railway securities where the railway belongs to, or the interest on the securities is guaranteed by, the Indian Government. By s. 4 of the Trustee Act, 1894, the retaining of an investment, originally proper, after it has ceased to be a proper investment for trust funds, is not in itself a breach of trust.

Formerly there was some doubt as to whether the right to invest in real securities justified an investment on mortgages of long leaseholds, which doubt was finally decided in the negative (*Re Boyd's Settled Estates*, 14 Ch. D. 626). Section 5 (1) of the Trustee Act, however, enacts that a trustee having power to invest in real securities, unless expressly forbidden by the trust instrument, may invest on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition of re-entry except for non-payment of rent. This enactment has created another doubt, namely, as to whether it applies to express powers only or express and statutory powers of investing in real securities. Most probably the courts will put the larger construction upon it.



**Sect. 4.** Section 1 of the Trustee Act, 1893, empowers the trustee to invest “any trust funds in his hands, whether at the time in a state of investment or not,” in these securities, “and also from time to time to vary any such investments.” This power is to be exercised at the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust. Accordingly, an express power to vary investments is now no longer necessary, and when inserted it is usually for the purpose not of extending the trustees’ powers, but of limiting their discretion.

Statutory  
rules as to  
investments.

The Trustee Act, 1893, makes certain provisions for the guidance and protection of trustees in making investments of the trust funds. The first of these is as to investments in real securities. Section 8 (1) provides that where a trustee (1) obtains a report from a competent surveyor ; (2) employed independently of any owner of the land ; (3) stating the market value of the land ; and (4) advising that the property is a sufficient security for the proposed loan, then, if, acting on the faith of this report, he advances on loan not more than two-third parts of the reported value, he shall not be liable merely by reason of the proportion of the amount of the loan to the value of the property. This is a modification of the old Chancery rule that a trustee was not justified in advancing on mortgage more than a half of the market value of the mortgage estate. Sub-section (2) of the same section provides that he shall not be liable merely because in advancing a loan on leaseholds, he dispensed wholly or in part with the production or investigation of the lessor’s title. (As we have seen, on an open contract to assign a lease the assignee is not entitled to production or investigation of the lessor’s title (*supra*, p. 92).) And by sub-s. (3) of the same section a trustee who acts with reasonable prudence and caution, is not liable for breach of trust merely because he, in effecting the purchase or lending

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money upon the security of any property, takes a shorter title than that he could require on an open contract. The reasonable prudence and caution expressly required by sub-s. (3) is impliedly required in the other sub-sections, and nothing therein contained will save from liability the trustee who has acted negligently (see *Re Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231).

Section 9 deals with advances improperly large on mortgage securities which would have been proper investments for smaller advances. Under it the trustee is to be liable only to the extent to which the advances are too large. The former rule was that in such cases the trustee was liable for all loss incurred. Section 9 applies to investments made before as well as after the passing of the Trustee Act.

It will be observed that the statutory powers of investment of trust funds do not include a power to invest in the purchase of land. Almost the only trust funds which by statute can be invested in the purchase of land, are capital money arising under the Settled Land Acts (s. 21 (vii.) Act of 1882), and compensation for settled land taken under the Lands Clauses Consolidation Act, 1845 (s. 69). In general, if it is desired that trustees should have such a power, it must be expressly given to them. When so given, then if the settlement is a personal one, there should be directions that the lands so purchased should be held in trust for sale, and the proceeds held on the same trusts as those declared of the trust funds, and so long as the lands are unsold, the rents and profits should go as the income of the funds would have gone—that is, directions similar to those set out in our precedent at p. 149, *supra*.

The trusts of the income of the settled property follow the trust for investment. Where it is the wife's fortune

Purchase of  
land with  
trust funds.

Trusts of  
income.

**Sect. 4.** that is settled, the first life estate is given to her, and usually a second life estate is limited to the husband if he should survive her, as in our precedent. The wife's life estate is declared to be for her separate use and without power of anticipation.

**Separate use.** The doctrine of separate use was one of the matters in which equity departed most completely from the common law. At common law a woman had during her coverture no capacity for holding any sort of property apart from her husband. On marriage her choses in possession, such as money, goods, etc., vested absolutely in her husband; her choses in action, such as debts due to her, stock, and leaseholds which were regarded as contract rights, vested in him for his life, and if he reduced them into possession, then in him absolutely; if he did not reduce them into possession, they survived to the survivor of him and her; while all her realty vested in him during his life, but he could not alienate it without her concurrence, and on his death it went to her, or, if she were dead, to her heirs. Equity in establishing the doctrine of separate use, entirely reversed the doctrine of a married woman's capacity to hold property. It held that when property was vested in a trustee for a woman's separate use, whether the woman was married at the time the property was vested in the trustee or married afterwards, the wife's equitable property was not affected by her coverture. She was still entitled to enjoy it as a *feme sole*. When the gift was made after marriage, and was direct to the wife for her separate use, then equity could not prevent the legal estate vesting in the husband, but it declared him to be a trustee for his wife, and her equitable property remained. In either case she could enjoy it, and dispose of it *inter vivos* and by will, exactly as if she were unmarried. But if she predeceased her husband without disposing of it *inter vivos* or by will, her husband's common law rights revived, and he took her personalty as her administrator, and a life estate

**Sect. 4.**

in her heritable freeholds as tenant by the curtesy. The doctrine of separate use being invented to protect the wife against the husband, ceased to operate when she no longer needed protection.

Since 1882 a married woman's legal capacity to hold property has been much the same as her equitable capacity. <sup>Statutory separate estate.</sup> By s. 1 (1) of the Married Women's Property Act, (45 & 46 Vict. c. 75) it is enacted that a married woman shall, in accordance with the provisions of that Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate estate in the same manner as if she were a *feme sole*, without the intervention of a trustee. This enactment applies to all the property, whenever acquired, of a woman married since December 31st, 1882, and to all the property acquired since that date by a woman married before January 1st, 1883. The Act, however, like the equitable doctrine of separate use, applies only during coverture. On the death of the wife, intestate, during the husband's life all his common law rights revive and he takes (subject to her debts ; s. 23 ; *Surman v. Wharton*, [1891] 1 Q. B. 491) all her personalty absolutely (*Re Lambert*, *Stanton v. Lambert*, 39 Ch. D. 626), and a life estate by the curtesy in her heritable freeholds (*Hope v. Hope*, [1892] 2 Ch. 336). •

In order, then, that the wife may enjoy the separate use of the property it is now no longer necessary to insert express words to that effect even when her enjoyment is without power of anticipation (*In re Lumley*, *Ex parte Hood-Barrs*, [1896] 2 Ch. 690) ; but in practice express words always are inserted.

The restraint on anticipation is also the creation of Restraint equity and intended for the protection of the wife. <sup>anticipati</sup> The separate use was designed to prevent the husband taking

**Sect. 4.** the wife's property ; the restraint on anticipation to prevent her giving it to him—under the persuasion, as Lord BROUGHAM said, of his “kicks or kisses.” And formerly the restraint was a nullity unless the property was held for the wife's separate use in equity (*Stogden v. Lee*, [1891] 1 Q. B. 661) ; but since the Married Women's Property Act, 1882, it may be, as we have seen, attached to property left to her without any limitation to her separate use (*In re Lumley, supra*).

When a restraint upon anticipation is imposed on property given to a woman it has no operation except during coverture. If at the time of gift she is unmarried she can do with the property as she pleases, and she has the same power if she afterwards becomes a widow (*Tullett v. Armstrong*, 1 Beav. 1) ; but as soon as she marries and as long as she remains married the restraint prevents her from in any way alienating or charging the corpus or income not accrued due of the property. It is liable after marriage for her ante-nuptial debts if her title to it accrued before marriage (s. 13 Married Women's Property Act, 1882) ; but it is not liable during coverture for debts contracted by her during coverture (*Pelton Brothers v. Harrison*, 20 Q. B. D. 120), though it would seem to be liable for these when coverture has determined to the extent of her then interest in it, *i.e.*, to the extent of her whole interest, less income, accrued due to her during coverture (*Re Wheeler's Settlement Trusts, Briggs v. Ryan*, [1899] 2 Ch. 717) ; at any rate, it will, on her husband's death, go to her trustee in bankruptcy when she has during coverture traded separately from her husband and been made bankrupt under s. 1 (5) of the Married Women's Property Act, 1882. And under s. 2 of the Married Women's Property Act, 1893, the court may order the costs of an action commenced by the married woman to be paid out of her separate estate in spite of a restraint on anticipation (see *Hood-Barrs v. Heriot*, No. 2,

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[1897] A. C. 177), and under s. 39 of the Conveyancing and Law of Property Act, 1881, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order with her consent bind her interest in any property notwithstanding she is restrained from anticipation (see *Re Pollard's Settlement*, [1896] 2 Ch. 552). And a restraint on anticipation does not prevent a married woman, who is a tenant in tail of the property subject to the restraint, from barring such entail (*Cooper v. Macdonald*, 7 Ch. D. 292).

The life estate of the wife in the income is usually followed by a life estate to the husband should he survive her. Such life estate is sometimes made determinable on his bankruptcy or on his attempting in any way to alienate or charge it. It is to be noted that such a provision would be void if the property settled were the husband's own. It would then be regarded as a fraud upon the husband's creditors. When it is attached to the husband's life interest in his wife's property there is usually a further provision that on its determination under this clause the income during the husband's life shall vest in the trustees who shall hold it upon trust to use it at their absolute discretion for the benefit of the husband and the children of the marriage. The husband's life interest is then said to be a *protected* life interest. The most usual protected life interests, however, arise in connection with provisions made by prudent parents for the support of thriftless children. Protected life estate.

After the trusts of the income follow the trusts for the children of the marriage with powers of appointment and hotchpot clause. These have already been sufficiently explained (*supra*, p. 180 *et seq.*). One point only may be noticed, and that is the absence of any provision for the maintenance of the children in case the parents should die while they are infants. Trusts for children.



s. 4.  
Statutory  
power of  
maintenance

Such a provision is now unnecessary in such a trust as that set out in our precedent. By s. 43 of the Conveyancing and Law of Property Act, 1881, it is enacted that where property is held by trustees in trust for an infant, either for life or for any greater interest and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Extent of  
s. 43 of  
Conveyancing  
Act.

As to this enactment the following points should be noted. In the first place, it applies only where the infant is absolutely or contingently entitled at *or before* attaining the age of twenty-one (*Re Judkin*, 25 Ch. D. 743). Accordingly, where the trust property is only to vest on the children attaining the age of twenty-five or some other artificial period, if their maintenance is to be provided for out of the income express powers must still be given. In the second place no provision is made as to whether or not maintenance can be given out of the income to children under age after one of their number has attained the full age. This has led to considerable differences of judicial opinion, some judges holding that on one child coming of age the whole property (and therefore the income of it) vests in him until another child attains full age, when the whole property vests in these two subject to open again to admit each of the other children as they attain full age. Others have held that after one attains full age those children under age are still contingently entitled to the income, and so the trustees may give them maintenance out of it. The Court of Appeal has now settled this difference by holding that on



one child coming of age he obtains a vested interest only in an aliquot part of the fund (*Re Holford, Holford v. Holford*, [1894] 3 Ch. 30). This principle, however, does not apply where the property settled is unconverted realty and the children are, on attaining twenty-one, to take equitable estates in common in it. Here the first child attaining twenty-one takes the whole income till another child comes of age just as if the limitation were a limitation of a legal estate in the land (*In re Averill, Salsbury v. Buckle*, [1898] 1 Ch. 523). Lastly, the trustees have an absolute discretion as to whether they will or will not grant maintenance, as to the amount of income they will allow for maintenance, and as to the way in which it shall be used. This does not mean that they may hand over whatever they like, or nothing if they like, without care or enquiry. They must honestly exercise their discretion, but if they exercise it honestly their decision cannot be questioned (*In re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324).

By the second sub-section of s. 43 the trustees are directed, after making what allowance they think proper for maintenance, to accumulate the rest of the income and hold it—subject to the power to use it at any time as current income—in trust for whoever “ultimately becomes entitled to the property” from which the accumulations arise. This enactment, again, has led to difficulties, as it would seem to mean that in the case of a gift of an immediate life estate to an infant the savings during the life tenant’s minority were not to go to him, but to the person absolutely entitled in remainder. However, in *Re Humphreys, Humphreys v. Levett*, [1893] 3 Ch. 1, the Court of Appeal held that this is not its meaning, that when a life estate is given that amounts to a direction that the life tenant is to take the income for life, and that this excludes any trust of accumulated income for the remainderman which might otherwise be implied by this sub-section.

Accumulations of income during minority.

**Sect. 4.**

Trusts in  
default of  
children.

After the trusts for the children come the trusts in default of children. These usually consist of, first, a power of appointment by will given to the wife, and then a trust over in default of appointment. This power of appointment should be given in all cases where it is the wife's own property which is being settled. There can be no reason why, because a woman marries she should give up the power of disposing by will of her own property when the objects of the settlement are exhausted. Where, however, the property settled is that of her father or mother, the power of appointment, at any rate, where the husband takes a life interest under the settlement, is usually and rightly omitted, as its only use can be to deprive the settlor's other children of the property of their parent for the benefit of a stranger in blood.

Ultimate  
trust.

The ultimate trust is in favour of "the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of Rosa Roe have been entitled thereto if she had died possessed thereof intestate and without leaving a husband or issue her surviving" (*supra*, p. 150). Sometimes instead of the last words is substituted the phrase "and without ever having been married." In either case the object of the trust is the same—to exclude the husband should he survive the wife from taking *jure mariti* and (where issue is mentioned) the children of the marriage who may survive her and die before attaining twenty-one, from taking as her next-of-kin. This being the object, the court usually puts such an interpretation on the clause as will carry it out. Thus, where the words were "die a spinster and intestate" (without any express reference to issue) it was held that a child by a previous marriage would take as next-of-kin (*In re Forbes, Errington v. Sempell* (1899), W. N. 6 (4)), and the same was held as to a child of the marriage, where the expression was "without ever having been married" (*Stoddart v. Saville*, [1894] 1 Ch. 480). At the same time where there are children by a former marriage, whom

it is not desired to exclude on failure of children by the contemplated marriage, the words used as to the issue excluded should expressly limit that term to issue by the marriage in contemplation. In view of the conflict of authorities the less that is left for the construction of the courts the better. Sect. 4.  
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The advancement clause usually follows the ultimate trust, and after it comes the declaration of the trustees' powers of management over the land until the sale takes place (*supra*, p. 151). As has already been pointed out, the existence of the trust for sale prevents the tenant for life of the income from exercising the powers which the Settled Land Acts gives to a life tenant of settled land (*supra*, p. 167). It is, besides, very doubtful whether s. 42 of the Conveyancing and Law of Property Act, 1881 (*supra*, p. 187), applies where there is a trust for sale of lands, and so upon the death of the life tenants while their children are still minors no implied powers of management may be in the trustees. For these reasons it is necessary to give the trustees express powers to manage the land till sale either with or without liberty to delegate these to the life tenant. And these powers should include a power to lease the land since such a power is not a mere power of management.

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The covenant by the wife to settle after acquired property then follows: In view of the importance of this clause and of the conflicting decisions of the courts on its construction where it is drawn generally, it is usual to draft it with great particularity. When drawn generally it will, however, be construed thus: When it refers to after-acquired property only, it will be held to apply only to property accruing during coverture, unless the contrary appears. As to such property, it will be held to extend to (a) all property in which the wife had a reversionary interest before marriage which accrues in possession after Covenant to settle after acquired property.

**Sect. 4.** marriage, but not reversionary property which remains reversionary throughout the coverture, and (b) all property in which she had no interest before marriage which accrues after marriage, either in possession or in expectancy. It will not, on the other hand, extend to property accruing after marriage to her in the form of (a) income of property settled to her separate use, (b) property which, by the terms of gift, she is restrained from anticipating, (c) property over which she obtains only a general power of appointment. (See Underhill and Strahan's Interpretation of Wills and Settlements, p. 243 *et seq.*) Where, as in the foregoing precedent, the covenant is to settle not merely after-acquired property, but also any property to which the said "Rosa Roe shall at the time of the said intended marriage be entitled," all property to which she then has any title, whether it be in possession, reversion, or contingency, is bound (*ibid.*, p. 253).

Formerly, when all the property accruing to the wife during coverture vested in the husband, it was not uncommon for the covenant to be expressed so as to bind him only, but now, in view of the Married Women's Property Act, 1882, and the decisions on s. 19 thereof, the invariable practice is to draft it as an agreement and declaration, so that all parties to the settlement may be bound.

Power to  
appoint new  
trustees.

The remaining clauses of the settlement to a large extent explain themselves. It is only necessary to say a word regarding two of them. The power to appoint new trustees is now regulated by ss. 10 and 25 of the Trustee Act, 1893. By s. 10 (a) new trustees may be appointed under an express power in the trust instrument, and (b) whether there is such express power or not, if a trustee is dead or out of the United Kingdom for more than twelve months, or desires to be discharged, or refuses or is unfit to act, or is incapable of acting, the persons

Sect. 4.

having power under the instrument to appoint new trustees, or if there are no such persons, or no such persons able or willing to act, then the surviving trustee or trustees, or the personal representatives of the last surviving trustee, may appoint. This latter part (b) applies only in so far as no contrary intention is expressed in the trust instrument. By s. 25, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable to do so without the assistance of the court, the court may appoint trustees in substitution for, or in addition to, any existing trustees, or although there is no existing trustee. By the Judicial Trustees Act, 1896, s. 1 (59 & 60 Vict. c. 35), a judicial trustee—that is, a trustee who is paid for his work and is an officer of the court—may be appointed by the court on the application of the settlor or a trustee, or beneficiary, to act either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

Where an express power is given to appoint new trustees in a personal settlement, this is usually lodged in the life tenant, or where the life tenant is a married woman in her and her husband jointly. In a strict settlement, however, it is not desirable that the life tenant should be able to appoint whom he pleases, since it is the trustees' chief duty to watch, in the interests of the remaindermen, the mode in which the life tenant exercises his powers under the Settled Land Acts. It is usual then to rely in such settlements on the statutory powers and allow the surviving trustees to appoint their successors.

The power to appoint agents is needed because the courts have held that costs incurred by trustees in employing professional men (such as solicitors) in what is not strictly professional work, but work which the trustees

Powers to  
appoint and  
pay agents.

**Sect. 4.** — themselves might perform, are not chargeable as against the *cestuis que trust*, and the power to give a professional trustee remuneration for work done by him for the trust, whether such work be strictly professional or not, is intended to meet the general rule of equity that a trustee cannot make profit out of his trust. (See *Re Fish*, [1893] 2 Ch. 413.) The provision that the powers and authorities of the trustees are to be vested in new trustees was formerly thought necessary in consequence of the old doctrine, that unless it was clear that the powers given were intended to be exercised by the surviving or new trustees, they could only be exercised by the trustees nominated by the settlement. By s. 10 (3) and s. 22 of the Trustee Act, 1893 (re-enacting s. 38 of the Conveyancing and Law of Property Act, 1881), the doctrine is now reversed, and unless it is clear the trustees who are nominated by the deed are alone to exercise the powers under it, these powers are exercisable by the surviving and new trustees. The clause, then, is now seldom necessary.

Statutory  
rights and  
powers of  
trustees.

A number of other clauses which were formerly necessary in settlements can now also be dispensed with owing to changes in the law as to trusts. The first of these is the receipt clause which made the trustees' receipt for purchase-money a sufficient discharge for any money, securities (including stocks, funds, and shares), or other personal property or effects, payable, transferable, or deliverable to them under the trust. A receipt from the trustees has now this operation without any receipt clause (s. 20 of the Trustee Act, 1893). Again, an indemnity clause making each trustee liable only for the money he actually received notwithstanding he joined in signing receipts, and only for his own acts and defaults, used to be commonly inserted. He has now this indemnity by statute unless there is something to the contrary in the trust instrument (s. 24, Trustee Act, 1893). Lastly, by s. 21 of the same Act (replacing s. 37 of the Conveyancing



and Law of Property Act, 1881), trustees possess very large powers of accepting composition or security, real or personal, for any debt or property, real or personal, claimed, and for settling, compromising, or abandoning any debts, claims, accounts, and things whatever relating to the trust. Sect. 4.

All a trustee's powers and duties, however, whether created by the trust instrument or by the law, are subject to this rule, that the trustee is bound to exercise or discharge them honestly or with reasonable diligence and care. If he so exercises or discharges them and acts within them, he is liable to no one for losses incurred by the trust estate. If he exercises them negligently or dishonestly, or if he does acts not within them, then he is guilty of a breach of trust, and if any loss is incurred by the trust estate, he is *primâ facie* liable for it. Breach of trust.

As, however, a trustee's duties are great and burdensome in spite of the alleviation which has recently taken place, Parliament has lately given him relief where the breach was innocent. This relief is given in three ways : Relief of breach of trust.

(a.) *By way of limitation of action.*

In all cases except (1) where the breach of trust is fraudulent ; (2) where the trust funds are still in the hands of the trustee ; (3) where the trust funds have been converted by the trustee to his own use ; the trustee may, after six years from the breach, plead the lapse of time as a bar to an action based on it. Time runs for this purpose against a married woman without power of anticipation, but not against a beneficiary until his interest vests in possession (s. 8 Trustee Act, 1888, 51 & 52 Vict. c. 59). Accordingly, a trustee remains liable to an action, not merely for six years after a breach of trust, but until six years after the interest of the last beneficiary taking by purchase under the settlement has vested in possession. But a beneficiary whose right of action is



**Sect. 4.**        barred is prohibited from taking any benefit under an action brought by one whose right is not barred.

(b.) *By way of indemnity.*

Where the trustee committed the breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, impound the interest of the beneficiary in question, or any part of it, by way of indemnity to the trustee, even though the beneficiary is a married woman entitled for her separate use without power of anticipation (s. 45 Trustee Act, 1893).

(c.) *By way of excuse.*

If the court is of opinion that the trustee liable for the breach of trust acted honestly and reasonably, and that he may fairly be excused, it may relieve him wholly or partially from personal liability for the same (s. 3, Judicial Trustees Act, 1896).

## PART IV.

### ASSURANCES BY WAY OF MORTGAGE.

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SECTION I.

MORTGAGES AT LAW AND IN EQUITY.

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“ITEM. If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, etc. 40 pounds of money, that then the feoffor may re-enter, etc., in this case the feoffee is called tenant in morgage, which is as much to say in French as mortgage and in Latine *mortuum vadium*. And it seemeth that the cause why it is called mortgage is for that it is doubtful whether the feoffor will pay at the day limited such sum or not ; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever and so dead to him upon condition, etc. And if he doth pay the money, then the pledge is dead as to the tenant, etc.” (Litt. s. 332 (a)). So LITTLETON explains the common law notion of a mortgage—as an estate granted to a lender on condition that if he is not

Mortgages a  
common law

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(a) As Lord COKE points out, a mortgage was so called “both for the reason here expressed by LITTLETON, as also to distinguish it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte quod ex suis proventibus acquiratur*. As if a man borrow a hundred pounds of another and maketh an estate of lands unto him until he hath received the said sum of the issues and the profits of the land, so as in this case neither money nor land dieth or is lost . . . and therefore it is called *vivum vadium*.” Another form of mortgage was the Welsh mortgage when the lender received the issues and profits of the land as interest. Both these are now obsolete in practice in England, though it seems that both are sometimes met with in Ireland.

**Sect. 1.** repaid his money on a certain day he is to take the land absolutely in lieu of it, while if the money is repaid on the day, the lender's estate is immediately to determine.

At common law, then, a mortgage creates an estate on condition, the condition being the payment of a certain sum on a certain day. Now, the common law always insisted on the exact and punctual performance of a condition where such performance was to defeat a subsisting estate. Accordingly, it insisted that, in case of a mortgage, if the loan was not repaid upon the very day it was to be paid, the mortgagor had failed to perform condition which was henceforth gone for ever, and the mortgagee's estate was absolute. If, on the other hand, the mortgagor repaid or tendered the loan on that day, the mortgagee's estate thereupon determined and the mortgagor was entitled at once to re-enter on the land (Co. Litt. 205 b).

Mortgages in equity.

In other words, the common law held the mortgagor and mortgagee to their agreement as disclosed in the mortgage deed. That deed was on the face of it an absolute conveyance of the mortgaged estate conditioned to determine if, and only if, a certain thing was done on a certain day and an absolute conveyance subject to the performance of this condition the common law held it to be. Perhaps it would have been better if this state of affairs had been allowed to continue. We should have been spared, as Lord BRAMWELL points out (*Salt v. Marquess of Northampton*, [1892] A. C. 1, at p. 19), "the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But," as he adds, "the piety or love of fees of those who administered equity has thought otherwise." And so there arose the right which is now called an equity of redemption.

Equity of redemption.

An equity of redemption has been described by the learned lord already cited as "a right not given by the

Sect. 1.

terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender, . . . on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties, the securities were to be the absolute property of the creditor" (*ibid.*, at p. 18). Equity established this right on the ground that though in form a mortgage was a grant of an absolute estate subject to a condition, in effect it was merely a giving of security for the payment of the debt. The essence of the transaction was not the transfer of the land, but the securing of the debt. This latter object could be thoroughly attained without insisting on the condition to repay being strictly fulfilled. If the lender was under no obligation to return the land to the borrower until the latter repaid the debt, the fact that the latter could not repay it on the precise day first agreed upon could not prejudice the lender. Accordingly, it held that the failure to pay the debt on that day should not deprive the borrower of all right to have his land returned to him ; if he repaid the debt and all interests and expenses within any reasonable time after that day he had in equity a right to call for a reconveyance to him of the land which had in law become the absolute property of the mortgagee.

This equity of redemption was itself subject to two conditions—one for its protection, the other for its restriction. Clogging the equity. The former of these is stated thus by Lord BRAMWELL : "This right of redemption shall not even by bargain between the creditor and debtor"—at the time the mortgage is entered into—"be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen" (*ibid.*, at p. 19). For example, if the creditor and debtor agree that if the latter fails to redeem within a year

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after the debt should be paid his right of redemption shall be gone, this agreement is void, and the debtor can redeem at a later time in cheerful disregard of it. “The borrower,” as Lord BRAMWELL says, “was such a favourite with courts of equity that they would let him break his contract.” “Once a mortgage always a mortgage” was the maxim of equity, and as one of the incidents of a mortgage was that the mortgagor could at any time, after due notice, redeem on payment of debt, interest, and expenses, any agreement to the contrary was repugnant to the nature of the transaction, and therefore void.

**Foreclosing  
the equity.**

The second condition was, that while the mortgagor was entitled to redeem at any reasonable time after the day fixed for repaying the loan, he could not use this right so as entirely to defeat the mortgagee’s right to have the debt repaid or to take the land in lieu of it. This right of the mortgagee to demand a settlement of the transaction was called his right to foreclose. After the day fixed for repayment the mortgagee, if unpaid, could apply to the court to direct the mortgagor to repay within a certain time or to be for ever foreclosed of his right to redeem the land. As we shall see, this now is only one of the many remedies a mortgagee has for the realisation of his debt and the interest upon it.

**Mortgagor’s  
and mort-  
gagee’s  
positions at  
common law.**

Both the common law and equity carried out consistently their respective views of the positions of the mortgagor and the mortgagee of land. The former, from the moment the mortgage deed was executed, regarded the mortgagee as the owner of the land. Where the mortgagor continued in possession after the mortgage (as he generally did) it regarded him as merely a tenant on sufferance, or, at most, the tenant at will of the mortgagee, and if the mortgagee took proceedings in ejectment, even though the mortgagor had made no default in paying



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interest or principal, and even though there was a covenant in the mortgage deed that his possession should not be disturbed until such default, the courts gave the mortgagee judgment without hesitation: he was the owner of the land, and therefore entitled to the possession of it. And on the death of the mortgagee the mortgaged land descended according to its nature: if it were freehold or copyhold, to his heir-at-law or his customary heir if he died intestate; and if he made a will it vested in his devisee; if it were leasehold, it went to his personal representatives.

Equity, on the other hand, regarded the mortgagor as the real owner and the mortgagee as a mere creditor. Accordingly, it permitted the equity of redemption to be parcelled out into the same estates as could be limited in the legal ownership of the land, and it attached the peculiar characteristics of the legal ownership to these estates. Thus a fee simple in the equity of redemption descended according to any special custom of descent affecting the land, and a fee tail in the equity could be barred only by fine and recovery. But the mortgagee's interest was regarded as mere personalty, and on his death it vested in his personal representatives.

Mortgagor's  
and mort-  
gagee's  
positions in  
equity.

This difference in the devolution of the mortgagee's interest in law and equity led to some difficulties. Where the mortgage was in fee, unless the mortgagee on his death devised his mortgage estates to his executors, the legal and equitable rights in them became vested in different persons—the legal rights in his heir or devisee, the equitable in his personal representatives. Accordingly, the persons who were capable of reconveying the land could give no discharge for the mortgage debt, and the person who could give a discharge for the mortgage debt was not capable of reconveying the land. This led

**Sect. 1.** to the practice of making mortgages of fee simple land  
**Conveyancing** by way of grants of long terms to the mortgagee without  
**Act, s. 30.** rent (*b*). Subsequently the difficulty was put an end to  
by s. 30 of the Conveyancing and Law of Property Act,  
1881, which enacts that estates of inheritance or estates  
limited to the heir as special occupant by way of mort-  
gage, shall, notwithstanding any testamentary disposition,  
devolve to the mortgagee's personal representatives in the  
same manner as if the same were a chattel real. The  
principle of this enactment is now extended to beneficial  
ownership in England. Neither of these enactments  
extends to land of copyhold tenure (Copyhold Act, 1887,  
s. 45, and Land Transfer Act, 1897, s. 1 (4)).

(*b*) There was another reason originally for making mortgages by  
way of lease, and that was the doubt once entertained whether the  
wife of a mortgagee who married after entering into the mortgage  
did not acquire a right to dower out of the husband's legal estate in  
the mortgaged land which could not be defeated by a reconveyance  
to the mortgagor (Co. Litt. 221 a). The practice, however, continued  
long after all doubt on this point was resolved (2 Bl. Com. 158).

## SECTION II.

## A MODERN MORTGAGE.

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MORTGAGES of land are still made by way of absolute conveyance, subject to a condition for reconveyance on repayment of the mortgage debt, and though many alterations have been made in the incidents of mortgages, the law still regards the mortgagee, and equity still regards the mortgagor, as the owner of the land. Both of these propositions, however, are subject to some exception. As to the first, of late what are called registered charges, which do not convey any estate in the land charged, are being substituted by legislation for the old legal mortgage (see *infra*, p. 298). As to the second, some mortgages convey no interest at common law, and so the common law view has no application to them. This is the case where the mortgagor himself has no interest at common law, as where he is a *cestui que trust* or has already mortgaged the freehold, or where the assurance used to create the mortgage is such as will not pass the legal estate, as in the case of a mortgage by a deposit of title deeds. In both these cases there is a mortgage in equity only. It is not intended to discuss equitable mortgages separately or at length ; but in what follows they will come up for consideration incidentally.

The simplification of assurances of land has long been a cherished object of the Legislature, and in the hope of attaining this object it has resorted to three different

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expedients. The first of these is assurance by registration ; the second, assurance by the ordinary form shortened by the implication of many of the terms and powers most commonly inserted in assurances of that kind ; and the third, assurance by a form of assurance settled by the Legislature itself, and, therefore, called statutory. The first of these is still in its infancy, and how it will work when it reaches maturity is as yet a matter of speculation. The second has been in active operation ever since the passing of those great statutes, the Conveyancing and the Settled Land Acts, and it has proved on the whole excellently useful. The only trouble is that now so many terms and powers are implied that a large part of many assurances consists of provisions to exclude terms and powers implied by law unless expressly excluded. The third has been often attempted, but conveyancers show a most unpatriotic dislike for the draftmanship of Parliament. Probably the difficulty they have experienced—as a late learned judge has said—in trying to put sense into statutes, has made them reluctant to run any similar risks in respect to deeds.

**Statutory  
form of  
mortgage.**

The draftmanship of most statutory forms of assurance is such as to justify conveyancers of this reluctance. But even when it does not the advantage of adopting well-drawn statutory forms is so small and the chance of using them improperly so great (*a*), that their use is commonly very limited. This is the case with the very clearly-drawn statutory forms relating to mortgages contained in Schedule III. of the Conveyancing and Law of Property

(*a*) As a common example of the mistakes which the use of statutory forms may cause, the case of statutory transfers of mortgages may be mentioned. These are only suited for the transfer of statutory mortgages, but some draftsmen use them for the transfer of mortgages in ordinary form, with the result that the legal estate in the land is not transferred to the transferee of the mortgage debt.

Act, 1881. Of these the one relevant to our present purpose may be given here. It is as follows:—

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### DEED OF STATUTORY MORTGAGE.

THIS INDENTURE made by way of statutory mortgage the       day of       1882 BETWEEN A. of       of the one part and M. of       of the other part WITNESSETH that in consideration of the sum of £       now paid to A. by M. of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial owner hereby conveys to M. All that (*parcels*) To hold to and to the use of M. in fee simple for securing payment on the       day of       1883 of the principal sum of £       as the mortgage money with interest thereon at the rate of (*four*) per centum per annum IN WITNESS etc.

This form, it will be conceded, is very short. Its brevity arises partly from the fact that it is applicable as it stands to only a very simple transaction and partly from the fact that besides the covenants implied in all mortgages by the use of the words “as beneficial owner hereby conveys”—as to which we will say something shortly (see *infra*, p. 237)—it also implies by the use of the words “by way of statutory mortgage” two other covenants. The first of these is a covenant that the mortgagor will on the stated day pay to the mortgagee the stated mortgage money with interest thereon in the meantime at the stated rate, and will thereafter if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon or on the unpaid part thereof at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money. The second is that if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime at the stated rate, the mortgagee at any time thereafter, at

**Sect. 2.** the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct (Conveyancing and Law of Property Act, 1881, s. 26). Why these covenants (or at any rate the latter), which are inserted in every mortgage, should be implied only in mortgages made “by way of statutory mortgage,” while other provisions which are often omitted from mortgages are implied in all mortgages whether made “by way of statutory mortgage” or not, is hard to say.

The form of statutory mortgage as it stands is, as has been said, applicable only to very simple transactions, and by the practice of conveyancers its use has been confined to these. It is true that the Act permits the form to be varied as circumstances may require (s. 26 (1)), but it has been found that when circumstances require much variation it is better to abandon the statutory form altogether and fall back on the ordinary mortgage, in the common form of which an example will now be given :—

Form may be varied.

Ordinary form of mortgage.

Date.

Parties.

Recitals.

THIS INDENTURE made the first day of April one thousand nine hundred BETWEEN John Doe of Long Acre in the parish of Morton Pinkney in the county of Northampton Esquire of the one part and John Dorey of 3003 Bedford Row in the City of London Solicitor and Bertram Black of the Home Farm in the parish of Morton Pinkney afore-said (hereinafter called the mortgagees) of the other part. WHEREAS the said John Doe is seised in fee simple free from all incumbrances of the freehold hereditaments intended hereby to be conveyed and is seised or entitled in customary fee simple to the hereditaments hereinafter covenanted to be surrendered (being copyhold of the Manor of Nobottle in the county of Northampton) subject to the customary rents suits and services AND WHEREAS by an indenture of lease dated the twenty-ninth day of October one thousand eight hundred and ninety-five and made between Sir Wilfred Nobottle of Nobottle Hall in the county of Northampton Baronet of the one part and the said John Doe of the other part all that messuage or tenement (*parcels as described in lease*) was demised



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unto the said John Doe from the twenty-ninth day of September then last past for the term of ninety-nine years at the yearly rent of two hundred and fifty pounds and subject to the covenants and conditions therein contained and on the part of the lessee to be performed and observed including a covenant to insure the said premises against loss or damage by fire in the joint names of the lessor and lessee in the sum of five thousand pounds at least AND WHEREAS the said mortgagees have agreed to lend to the said John Doe the sum of ten thousand pounds out of moneys belonging to them on a joint account upon having the repayment thereof with interest secured in the manner hereinafter expressed Now **THIS** First testatum. INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of ten thousand pounds paid to the said John Doe by the mortgagees on or before the execution of these presents out of moneys belonging to them on a joint account (the receipt whereof the said John Doe hereby acknowledges) the said John Doe hereby covenants with the mortgagees to pay to Covenant to repay principal. them on the first day of September next the sum of ten thousand pounds with interest thereon in the meantime at the rate of five pounds per centum per annum computed from the date of these presents And further if the Covenant to repay interest. said principal money shall not be so paid to pay to them their executors administrators and assigns interest at the rate aforesaid by equal half-yearly payments on the first day of April and the first day of September in every year on the principal money for the time being remaining due under these presents Provided always and it is hereby Proviso for reduction of interest agreed and declared that if the said John Doe his heirs executors and assigns shall on any half-yearly day on which the interest is hereinbefore made payable under these presents or within twenty-one days after such day pay to the mortgagees their executors administrators or assigns interest on the principal money for the time being remaining due under these presents at the rate of four pounds per centum per annum and if the said John Doe his heirs executors and assigns shall during the preceding half-year ending on such day perform and



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|------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Second<br>testatum.          | observe all the covenants and conditions herein expressed or implied and on his part to be performed or observed (other than the covenants for payment of the said principal money and interest thereon) then and in such case the mortgagees their executors administrators and assigns shall accept such interest in lieu of interest at the rate of five pounds per centum per annum for such half-year.                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Conveyance<br>of freehold.   | AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the said John Doe as beneficial owner hereby conveys unto the mortgagees all that piece or parcel of land ( <i>parcels describing the freeholds</i> ) to hold the same unto and to the use of the mortgagees in fee simple subject to the proviso for redemption hereinafter contained                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Third<br>testatum.           | AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the said John Doe as beneficial owner hereby covenants with the mortgagees that he the said John Doe will forthwith at his own cost surrender or cause to be surrendered into the hands of the lord of the manor of Nobottle according to the custom thereof ( <i>parcels describing copyhold hereditaments</i> ) to the use of the mortgagees in customary fee simple according to the custom of the said manor by and under the rents heriots suits and services therefor due and of right accustomed subject nevertheless to a condition for making void the same corresponding to the proviso for redemption hereinafter contained as to the freehold and leasehold hereditaments hereby conveyed and assigned respectively |
| Fourth<br>testatum.          | AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the said John Doe as beneficial owner hereby demises                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Sub-demise<br>of leaseholds. | unto the mortgagees the messuage or tenement comprised in the aforesaid indenture of lease to hold the same unto the mortgagees for all the residue now unexpired of the said term of ninety-nine years granted therein by the said indenture (except the last day of the said term) subject to the proviso for redemption hereinafter contained                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Proviso for<br>redemption.   | Provided always and it is hereby agreed that if the said sum of ten thousand pounds with interest thereon shall                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

be paid on the twenty-ninth day of September next according to the foregoing covenant in that behalf then and in such case the freehold premises hereby conveyed shall at the request and cost of the said John Doe his heirs or assigns be conveyed to him or them and the demise hereby made of the leasehold premises shall be void AND the said John Doe hereby covenants with the mortgagees that he the said John Doe his executors administrators and assigns will at all times keep the said leasehold premises insured against loss or damage by fire in the sum of five thousand pounds at least in conformity with the covenant in that behalf contained in the aforesaid indenture of lease and will pay all premiums payable in respect of such insurance within seven days after the same shall become due and will on demand produce to the mortgagees their heirs executors administrators or assigns the policy of such insurance and the receipt for every premium payable in respect thereof And it is hereby agreed and declared that after any sale of the said leasehold premises or any part thereof under the statutory power of sale the said John Doe or other the person in whom the premises so sold shall for the time being be vested for the residue of the term granted by the said indenture of lease shall stand possessed thereof In trust for the purchaser and to be assigned and disposed of as he may direct And it is hereby agreed and declared that no lease made by the said John Doe his heirs executors administrators or assigns of the said freehold copyhold or leasehold premises hereinbefore described or any part thereof during the continuance of this security shall have effect by force or virtue of section eighteen of the Conveyancing and Law of Property Act 1881 unless the mortgagees their executors administrators or assigns shall consent thereto in writing IN WITNESS etc.

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Covenant to insure.

Trust of nominal reversion of leaseholds.

Limitation of statutory power to lease.

SECTION III.

CLAUSES OF A MODERN MORTGAGE.

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**Date parties and recitals.** THE date parties and recitals differ very slightly from those in a conveyance on sale which we have already discussed, and therefore this part of the mortgage (to use Lord COKE's words) "upon that which hath been said needeth no further explication" (Co. Litt. 205 b).

**First part of mortgage.** The characteristic part of the mortgage begins with the first witnessing part. That, as our precedent shows, sets out the consideration or loan, the receipt of it, a covenant to repay the loan, a covenant to pay in the meantime interest at the stated rate, and sometimes a proviso for the reduction of the stated interest on punctual payment. A word or two on each of these, save the receipt clause, is needed.

**Consideration.** First, then, as to the consideration. When the money is advanced by one mortgagee, the consideration is stated in the same way as in a conveyance on sale. When the money is advanced by two or more mortgagees, the

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mortgagees are usually trustees of the money advanced, and then the practice is to express that they advance it, not as trustees, but as absolute owners, "out of moneys belonging to them on a joint account." The object of this is "to keep the trusts off the title" to the land mortgaged.

The difficulty which this expression was designed to overcome was this: Equity always leans against joint tenancy, and in the case of mortgage it has always held that *primâ facie* money advanced by two or more mortgagees does not create a joint tenancy in the mortgage debt unless this clearly appears to have been intended. Accordingly, if trustees advanced trust money merely as if they were beneficial owners of the money advanced, equity would hold that they were tenants in common, and on the death of one the survivors could not give a discharge of the mortgage debt without the concurrence of the personal representatives of the deceased trustee. They could, of course, avoid this by showing that they were trustees of the mortgage money, and therefore joint tenants, but to do so would give the mortgagor or other person repaying the mortgage debt notice of the trusts. This, even at the present day, may cause considerable inconvenience (see *Re Blaiberg and Abraham's Contract*, [1899] 2 Ch. 341). \*When, however, the trustees were expressed to advance the money "out of moneys belonging to them on a joint account," then, to use the words of PEARSON, J., in *Re Harman and the Uxbridge and Rickmansworth Rail. Co.* (49 L. T. 130, at p. 131), though "it is common knowledge among conveyancers that when in a mortgage the mortgage money is stated to belong to two or more persons upon a joint account, and the conveyance is made to those persons, they are, in ninety-nine cases out of a hundred, trustees . . . the court has always resolutely refused to go behind the recitals in the deed and inquire what the trusts were."

**Sect. 3.**  

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Formerly it was customary to go even further, and state not merely that the money was advanced “out of moneys belonging to them on a joint account,” but either to add to these words “both in law and in equity,” or else to give express powers to the survivors or survivor of the mortgagees to give a good discharge for the mortgage debt. Whether this was ever necessary or not, it is necessary no longer, since the Legislature has now enacted, that where in a mortgage, or a transfer of a mortgage, the sum or any part of the sum advanced is expressed to be advanced by more persons than one jointly and not in shares, the mortgage money or other money or money’s worth for the time being due to those persons on the mortgage, shall be deemed to be and remain money or money’s worth belonging to them on a joint account as between them and the mortgagor ; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money’s worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account (Conveyancing and Law of Property Act, 1881, s. 61). The effect of this is to make mortgage money expressed to be advanced out of moneys belonging to the mortgagees on a joint account a joint debt as between mortgagor and mortgagees in spite of express notice that the joint tenancy in it has been dissolved as between the mortgagees themselves. This enactment applies to all mortgages made since 1881, save in so far as it is not excluded by the terms of the mortgage deed (*idem*).

**Covenant to  
pay principal**

The covenant to repay the mortgage debt is not an absolutely necessary part of a mortgage deed. Without any such covenant the mortgagor would be under an obligation to repay, unless there was a special provision in the mortgage deed making the land alone liable for the debt (*Yates v. Aston*, 4 Q. B. 182). If, however, there is no covenant to repay, the mortgage debt is then merely a

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simple contract debt, and so is barred by the lapse of six years without payment of interest or acknowledgment of the debt in writing by the mortgagor. Generally speaking, the remedy for the recovery of a debt secured by covenant—a specialty debt, as it is called—is barred only after the lapse of twenty years after such payment or acknowledgment; but, in the case of money secured on land, as the chief remedy—that against the land—is barred in twelve years under s. 8 of the Real Property Limitation Act, 1874, it has been held that the personal remedy against the mortgagor under the covenant is then barred too (*Sutton v. Sutton*, 22 Ch. D. 511).

The covenant is, as a rule, now so framed as to make the debt repayable on the first day on which interest on it becomes due. Generally speaking, it is not intended that the debt should be then repaid, but the effect of this is to give the mortgagee from such day all the rights—now not very numerous—which arise on the failure of the mortgagor to redeem according to agreement. Sometimes, however, where it is desired to secure the mortgagor from being called on to repay the money at an inopportune time, the covenant is so framed as to prevent the mortgagee calling in the mortgage before a certain date unless there is a failure to pay interest before that time. Even where this is the case, and even where there is a covenant on the part of the mortgagee not to disturb the mortgagor's possession during this period while the interest is punctually paid, the mortgagee can at any time bring ejectment against the mortgagor. The mortgagee is owner of the land in law, and as such entitled to possession of it. Formerly there was no defence to such an action, the mortgagor's sole protection lying in an action for damages for breach of the covenant not to claim possession, where there was such a covenant on the mortgagee's part (*Cholmondeley v. Clinton*, 2 Meri. 359). Now, however, the mortgagor can obtain a stay of proceedings in an



**Sect. 3.** — action of ejectment on payment to the mortgagee of the debt, interest, and costs (Common Law Procedure Act, ss. 219, 220).

Where the money advanced was trust money it was formerly the practice to make the mortgagor covenant with the mortgagees, “or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns.” This, however, is no longer necessary, since by s. 60 of the Conveyancing and Law of Property Act, 1881, it is enacted that a covenant made with two or more jointly to pay money, or to make a conveyance, or to do any other act to them or for their benefit, shall be deemed to include and shall imply an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant devolves. This provision applies to every covenant in any deed executed after 1881, except in so far as it is excluded by the terms of the deed.

**Covenant to pay interest.**

As to the covenant to pay interest, two observations are to be made. In the first place, it is well to secure by separate covenant the interest payable after the time fixed for repayment of the mortgage debt so as to enable the mortgagee on failure to receive payment of the interest to sue for it without also suing for the repayment of the mortgage debt. If there is no separate covenant interest can only be recovered as damages for nonpayment of the mortgage debt on the day fixed for payment. Such damages will be assessed at the rate of interest set out as payable until the time fixed for repayment, unless that rate exceeds five per cent., in which case they will be assessed at the rate of five per cent. (*Re Roberts*, 14 Ch. D. 49). In the second place, it is very usual to ensure the prompt payment of such interest by the insertion of a clause such as that in our precedent providing for a reduction of the rate of interest on punctual payment.



**Sect. 3.**  

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When this is done the rate payable on punctual payment is, of course, the rate really intended to be secured, and the higher rate is really a penalty for unpunctual payment. But penalties for failure to pay interest are contrary to the rule of equity against clogging the redemption (*supra*, p. 221); and so if this clause were drawn ostensibly as a penalty clause it would be void. Though, however, in reality a penalty clause, it is in form a clause of relief, and so equity (which, as we are assured, looks to the essence of the transaction when a mortgage is concerned) holds this clause good and altogether for the benefit of the mortgagor.

After the part of the mortgage deed containing the covenants to pay principal and interest comes the real mortgage. It is introduced by a testatum, which is repeated as often as different kinds of property are dealt with, and in form its operative words are practically precisely similar to those in an ordinary grant of that kind of property (*supra*, p. 229), with the addition of a reservation of a right to redeem.

The mortgagor is always expressed to convey "as beneficial owner" when he mortgages on his own behalf. When he is a trustee he is expressed to convey "as trustee" at the request of the equitable owner, who, "as beneficial owner," confirms the conveyance. Where the mortgagor conveys "as beneficial owner," or the equitable owner requests and confirms the conveyance as beneficial owner, then, in the case of freeholds, the same covenants are implied by s. 7 (c) of the Conveyancing and Law of Property Act, 1881, as are implied in the case of a conveyance or sale by the "beneficial owner," namely, covenants for (1) right to convey; (2) quiet enjoyment; (3) freedom from incumbrance; and (4) further assurance (see *supra*, p. 69). There is this difference, however, between the covenant implied in a conveyance and in a mortgage, that, as we have seen, those in the

Operative words.

Implied covenants or title.  
(1) As to freeholds.

**Sect. 3.** former case are “qualified” (see *supra*, p. 68), while in the latter case they are “absolute” (see *supra*, p. 94). The point, however, is of little importance, since their being absolute to no considerable extent extends the mortgagee’s remedy or the mortgagor’s liability. Independently of the covenants for title, these are limited to the recovery of the mortgage debt, with interest and costs properly incurred by the mortgagee, and with the help of the implied covenants this limit is extended almost to include costs incurred by the mortgagee in defending his title to the land. It is only in the rare case where the mortgage expressly frees the mortgagor from personal liability to repay the mortgage debt that these covenants are very important. There are these further differences between these covenants and those implied in a conveyance on sale, that the covenant for quiet enjoyment operates only after failure to pay the mortgage debt is made, and that the covenant for further assurance makes the mortgagor until, and the person requiring its performance after, foreclosure or sale, liable for the expenses arising from its performance.

(2) As to copyholds.

The same covenants are implied as to the copyholds by the mortgagor covenanting as beneficial owner to surrender, provided the covenant is executed before the actual surrender takes place (*supra*, p. 70). In the case of a mortgage it is of great importance that the covenant should precede the surrender, since otherwise not merely are no covenants for title implied under it, but neither are the powers of sale given to the mortgagees under s. 19 of the Conveyancing and Law of Property Act, 1881. And it is also of great importance that the surrender should be made immediately after the mortgage deed is executed, since until the copyhold is surrendered, and the mortgagee admitted tenant, the latter has only an equitable interest in the copyholds, which is liable to be defeated by a sale by the mortgagor to a subsequent purchaser, or

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to be postponed to a subsequent mortgagee without notice of the mortgage, who is admitted before the first mortgagee. Some conveyancers insert a clause in the mortgage deed making the mortgagor trustee of the copyholds until the mortgagee is admitted. But this clause is practically useless, as without it the mortgagor is, in fact, trustee. A more useful expedient is to insert a clause giving the mortgagee an irrevocable power of attorney to surrender the copyholds. This enables him to avoid delay by himself surrendering as attorney of the mortgagor and obtaining admittance; but if it is not acted upon, the power itself is no protection.

(3.) As to leaseholds conveyed by a mortgagor as <sup>(3)</sup> leaseholds, beneficial owner, there are implied besides the before-mentioned covenants, two others—(5) a covenant for the validity of the lease conveyed; (6) a covenant for payment of any rent reserved and for performance of any covenants contained in the lease conveyed (s. 7 (1) (D.)). Strictly interpreted, the words of s. 7 seem applicable to mortgages of leaseholds by assignment of the lease only, but it has always been understood that it applies to mortgages by sub-demise.

Mortgages of leaseholds may, of course, be made by assignment as well as by sub-demise. This is the simpler and safer course in the case of long terms, where no rent of money value is reserved, and where there are no onerous covenants. But where the lease is subject to rent and covenants, it is not the practice to make it by assignment, as to do so would render the mortgagee liable personally for any breach of covenant by the mortgagor. In such case the mortgage is made by sub-demise. In order that a sub-demise may not operate as an assignment of the term, the sub-lease must be for a shorter period than the unexpired residue of the term at the time the sub-lease was granted, but provided the period is shorter, it does not matter how much or how little shorter it is.

**Sect. 3.** Accordingly, where it is wished practically to assign the residue of the term, and at the same time technically to make the transaction not an assignment but a sub-lease, the sub-lease is granted for the whole of the residue less one day. That is the form of assurance adopted in our precedent, and it is the usual one followed in mortgages of leaseholds.

**Bankruptcy  
of mortgagor  
of leaseholds.**

Another difference between a mortgage of leaseholds by assignment and by sub-demise is, that on the bankruptcy of the mortgagor the mortgage by assignment is not affected, while if the mortgage is by sub-demise, the nominal reversion on the sub-demise vests in the trustee in bankruptcy of the mortgagor. This would be of no importance were it not that the trustee has power to disclaim, within twelve months of the bankruptcy (Bankruptcy Act, 1890, s. 13) any leasehold property of the bankrupt vesting in him which is subject to onerous covenants (Bankruptcy Act, 1883, s. 55). If the trustee disclaims the nominal reversion under this power, the mortgagee is put to his election whether he will have the lease vested in him, or give up his security. If he elects to have the lease vested in him—as he will, of course, usually do, since the lease would never have been taken as a sufficient security for the mortgage debt if it had not a considerable market value—the court, in making the order, may direct that it shall vest in him, subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order (Bankruptcy Act, 1890, s. 13). Sometimes elaborate provisions are introduced to save the mortgagee by sub-demise for being compelled to make this election, but these are seldom of much practical advantage.

**Proviso for  
redemption**

Next follows the proviso for redemption. Formerly, as has been pointed out, the estate granted to a mortgagee

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was what would now be called a conditional limitation—an estate which automatically determined on the day fixed for the repayment of the mortgage debt and interest, provided these were then paid. But since the doctrine of an equity of redemption existing in the mortgagor after that day was passed became established, the estate granted has changed its character. It is still an estate subject to a condition subsequent, but the condition is not that it shall determine, but that the mortgagee shall re-convey on the mortgage debt being paid. The mortgage debt is never, in practice, paid on the day fixed, that day, as has already been said, being now of importance chiefly because until it has passed the mortgagee has no remedy by foreclosure. After it has passed the mortgagor can at any time redeem, by giving six months' notice of his intention to do so, or by paying six months' interest in lieu of notice. And though the right to redeem is in terms reserved to the mortgagor, his executors, administrators, and assigns only, yet any one interested anyhow in the equitable estate, called the equity of redemption, whether as assignee, mortgagee, or even lessee (*Tarn v. Turner*, 39 Ch. D. 457), has also the right to redeem.

As has been said, the date fixed for repayment is chiefly important now because upon it arises the right of the mortgagee to claim a foreclosure. This is now claimed by application to the High Court, or, where the mortgage does not exceed 500*l.* (County Courts Act, 1888, s. 67 (3)), to the county court. On such application accounts are taken between the mortgagor and mortgagee, and the mortgagor is directed to pay the sum found due by him within six months of such time as such sum is certified to be due, or in default, to be “debarred and foreclosed of and from all right, title, and equity of redemption.” Just as a puisne or subsequent mortgagee is entitled to redeem, so is he entitled to foreclose. When he does so, the rule is to “redeem up and foreclose down”; that is, he has to pay

Rights to  
redeem and  
foreclose.

**Sect. 3.** off all those incumbrancers whose charges have precedence of, and he forecloses all those whose charges are subsequent to his own. Any of the latter, however, can themselves obtain his right to foreclose by redeeming his incumbrance.

**Reconveyance by mortgagee.** On the mortgagor after giving the mortgagee due notice of his intention to redeem, or paying interest in lieu of notice, tendering the principal money with interest and costs, the mortgagee is bound to reconvey. Formerly he was bound to reconvey only to the mortgagor, unless express words in the mortgage deed extended his obligation. But now by s. 15 of the Conveyancing and Law of Property Act, 1881, and s. 12 of the Conveyancing Act, 1882, a mortgagor or incumbrancer has power, instead of taking a reconveyance, to require the mortgagee to assign the mortgage debt, and convey the mortgaged property to any third person as the mortgagor or incumbrancer directs. A requisition by an incumbrancer is to prevail over a requisition of the mortgagor, and as between incumbrancers, a requisition of a prior incumbrancer over a requisition of a subsequent incumbrancer. And by s. 29 of the Trustee Act, 1893, where the mortgagee refuses to reconvey, or where there is doubt as to who should reconvey, the court may make an order vesting the legal estate in the mortgagor.

**Other remedies of mortgagee.**

But action for foreclosure is by no means the only remedy the mortgagee has for the recovery of his mortgage debt and interest thereon. Besides foreclosing he may (1) take possession of the mortgaged land, or instead of taking possession (2) he may usually appoint a receiver of the rents and profits; and instead of foreclosing (3) he may sell the mortgaged land; (4) and after sale or foreclosure, or concurrently with either of these, he may sue the mortgagor on his covenant to repay the debt, or if there be no such covenant, on the implied contract to pay arising out of the loan. A few words about each of these remedies will be sufficient for present purposes.



Sect. 3.  

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## (1.) TAKING POSSESSION.

This remedy is one not generally taken advantage of (1) Taking possession. owing to three causes. In the first place, when a mortgagee takes possession, he renders himself liable to account for not merely all the rents and profits he receives, but also for all those he might have received had he not been negligent. In the second place, he is not entitled to remuneration for the trouble of management save he is a solicitor, when under the Mortgagees' Legal Costs Act, 1895, he can charge costs for legal work done by him. And in the third place, if the land is held under a lease with onerous covenants, by taking possession he renders himself personally liable on them.

## (2.) APPOINTING A RECEIVER.

This is in its practical results equivalent to taking (2) Appointing a receiver possession, and it exposes the mortgagee to none of the inconveniences suffered by him when he takes possession. Formerly, in order to entitle him to appoint a receiver, an express power to do so had to be given by the mortgage deed, but now by s. 19 of the Conveyancing and Law of Property Act, 1881 (re-enacting and extending s. 19 of Lord Cranworth's Act), such a power is implied unless it is expressly excluded in all mortgage deeds executed after 1881. The mortgagee is entitled to appoint by writing under his hand a receiver in the same circumstances as would entitle him to exercise the statutory power of sale (s. 24 (1), and see *infra*, p. 246).

The position and powers of a receiver once he is appointed under this statutory power are now regulated by s. 24. As to his position, the most important points to be noted are (1) that he is not the agent of the mortgagee who appoints, but of the mortgagor whose default gave the mortgagee the power to appoint him (s. 24 (2)).



**Sect. 3.** Accordingly, the mortgagor and not the mortgagee is liable for the receiver's acts and defaults unless the mortgage deed otherwise provides. And (2) a person paying money to him is not concerned to inquire whether any event has happened to authorise the receiver to act (s. 24 (4)). And (3) the receiver is to receive the remuneration by commission on the amount received by him set out in his appointment, provided that commission is not at a higher rate than five per cent. (s. 24 (6)). The chief powers and duties of the receiver are (1) to demand and recover all income of the property of which he is appointed receiver by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same (s. 24 (3)) ; and if so directed in writing by the mortgagee insure against damage by fire out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature (s. 24 (7)) ; and (3) apply all money received by him as follows : (a) In discharge of all rents, taxes, and outgoings affecting the mortgaged property ; (b) In keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver ; (c) In payment of his commission and of the premiums on fire, life, or other insurances (if any) properly payable under the mortgage deed or under the Conveyancing and Law of Property Act, 1881, and the cost of executing necessary or proper repairs directed in writing by the mortgagee, and (d) in payment of the interest accruing due in respect of any principal money due under the mortgage. The residue of the money received by him he is to hand over to the person who, but for his possession, would be entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

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It is to be noted that this section gives the receiver no power to make leases. As he is by it the agent of the mortgagor, it would seem to follow that even after he has taken possession the mortgagor is still a mortgagor in possession within the Act, and therefore has the powers of leasing given to him as such (s. 18 (1)). Where it is desired, accordingly, that after the receiver is appointed he should have full powers over the land, this right to make leases should be expressly given to him by the mortgage deed.

The power of appointing a receiver given by the Act is now generally relied upon in ordinary cases of mortgage. But in cases where it is probable a receiver will sooner or later have to be appointed, it is more usual to appoint him by a separate deed executed along with the mortgage. He is then appointed by the mortgagor with the consent of the mortgagee, and he, of course, does nothing until circumstances arise which justify his intervention. The object of having him appointed in this way is to enable the mortgagee to keep possession of the mortgage. When so appointed his powers and duties may be expressly set out or given by reference to the statutory powers above considered.

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### (3.) SALE.

Formerly it was also customary to insert in the mort- (3) Sale.  
gage deed an express power enabling the mortgagee to sell the mortgaged land in case there was default in payment of interest for a certain time—usually three months—or in case the principal money had become payable and default had been made in paying it for a certain period—usually six months—after written notice to pay had been given. This power and those other clauses ancillary to it—such as the power of the mortgagee to give on sale an effectual discharge for the purchase money, and

**Sect. 3.** directions as to the application of the purchase money—are now usually omitted in reliance on the statutory power of sale, etc., implied by the Conveyancing and Law of Property Act, 1881, in every mortgage executed after 1881.

The statutory power of sale is given and defined by s. 19 (1) of the Conveyancing and Law of Property Act, 1881. The power is to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title, or other matters as he (the mortgagee) thinks fit, with power to vary any contract of sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby. This power is, by s. 20, not to be exercised unless and until (1) notice to pay the mortgage debt has been served on the mortgagor and default has been made as to all or part thereof for three months, or (2) some interest is in arrear for two months, or (3) there has been a breach of some provisions contained in the mortgage deed or in the Act, and on the part of the mortgagor or of some person concurring in making the mortgage, to be observed or performed other than and besides a covenant for payment of the mortgage money or interest thereon. Section 21 gives the mortgagee exercising the power, authority to convey the property mortgaged to the purchaser discharged of all interests and rights to which the mortgage had priority (sub-s. (1)), and where the sale is in “professed exercise” of the power, makes the title of the purchaser unimpeachable on the ground that the power was improperly exercised (sub-s. (2)). See *Life Interest, etc. Securities Corporation v. Hand-in-Hand Insurance Society*, [1898] 2 Ch. 230). By sub-s. (3) of the same section provision is made for the

Sect. 3  

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application of the purchase money—namely, firstly, to the payment of incumbrances having priority to that of the person exercising the power to which the sale is not made subject, then to hold the residue in trust to apply it (1) for payment of costs incident to the sale, (2) in discharge of his own mortgage debt, interest and costs, and (3) as to the residue, to pay it to the person entitled to the mortgaged property or authorised to give receipts for the sale thereof. It is expressly provided that this power of sale shall not affect the mortgagee's right to foreclose (s. 21 (6)).

It is to be noted that the mortgagee in exercising this power of sale is not a trustee in the strict sense of the word. If he acts in good faith and honestly that is all that is required of him (*Kennedy v. De Trafford*, [1897] A. C. 180 ; *Nutt v. Easton*, [1899] 1 Ch. 873).

In connection with the power of sale the trust of the nominal leasehold reversion on a mortgage of leaseholds made by sub-demise should be noted (*supra*, p. 231). This trust is invariably inserted in mortgages by sub-demise. Its object is to secure that in case of sale the purchaser shall become entitled to the mortgagor's lease, and not merely to the sub-demise. The sub-demise is made for the purpose of preventing the mortgagee being held liable for breaches of the covenants in the lease while the mortgagor remains in possession. Its utility ceases when the mortgagee or the purchaser from him takes possession. In the case of a sale the purchaser, as a rule, prefers to have control not merely of the sub-lease, but also of the lease itself.

Since registration of title came in fashion it has become the practice to insert in mortgages a covenant on the part of the mortgagor that he shall not register himself as owner of the mortgaged land. The object of this covenant is to aid the power of sale. If the mortgagor should register himself as owner without disclosing the mortgage, as he is entitled to do, then on the mortgagee exercising

Covenant  
not to  
register ti

**Sect. 3.** the power of sale it would be necessary to have the land transferred in the register from the name of the mortgagor to that of the purchaser. This the registrar would not do without the consent of the mortgagor or, in default of this, without an investigation of the mortgagee's title. The covenant is meant to prevent any difficulties of this kind arising by ensuring that the mortgagor shall not register.

#### (4.) ACTION ON THE COVENANT.

(4) Action on covenant. It is hardly necessary after what has already been said (*supra*, p. 237), to add anything further save this, that this action is not an alternative but a concurrent remedy with those of foreclosure and sale. If the mortgagee sells, and the purchase money does not reach the amount of his debt, he may sue the mortgagor for the balance. If he forecloses he may at the same time value his security and sue for the balance. But in the latter case he cannot sue on the covenant, unless he is still in a position to return the mortgaged land. As it is put technically, an action for the mortgage debt "re-opens the foreclosure," and if it is impossible—as by the mortgagee having sold or otherwise parted after the foreclosure with some of the land—to re-open the foreclosure and give the mortgagor another chance of redeeming, the mortgagee cannot sue on the covenant.

Implied  
power to  
insure.

Our precedent contains an express covenant on the part of the mortgagor to keep insured the buildings of the leasehold premises in accordance with the covenant in the lease and to produce the receipts for the premiums. In the case of mortgages of leaseholds by assignment and probably also by sub-demise the first part of this covenant would hardly be necessary since, as we have seen by s. 7 (1) (D.) of the Conveyancing and Law of Property Act, a covenant in such cases is implied by the use of the words "beneficial owner" to perform the covenants in the lease (*supra*, p. 239). But the second part is always

necessary in order that the mortgagee may be able at any time to ascertain whether the covenant is being performed.

Where there is no covenant to insure in the lease there is no obligation imposed on the mortgagor to insure implied in the mortgage deed. But by s. 19 (1) (ii.) a power is implied in all mortgage deeds for the mortgagee to insure and keep insured against damage by fire any building or other property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate as the mortgage money. By s. 23 the amount of such insurance is not to exceed the amount specified in the mortgage deed, and if no amount is specified then two-thirds of the amount that would be required in case of total destruction to restore the property insured. And by the same section the power to insure is not to be exercised—(a) Where there is a declaration in the mortgage deed that no insurance is required; (b) where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed; (c) where the mortgage deed contains no stipulation respecting insurance and an insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is by the Act authorised to insure. The same section also provides that all money received on an insurance effected under the mortgage or under the Act shall if the mortgagee so requires be applied by the mortgagor in making good the loss or damage in respect of which it is received, or, subject to special agreement to the contrary, to paying off the mortgage debt.

The implied powers to sell, to appoint a receiver, and to insure, are all such as were formerly inserted in mortgage deeds for the benefit of the mortgagee. There is another



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Implied  
power to cut  
timber.

Implied  
power to  
grant leases.

implied power also for his benefit, which arises only on his taking possession, and a further implied power for the good management of the mortgaged estate whoever may be in possession. The former of these is the power given by s. 19 (1) (iv.) to the mortgagee in possession to cut and sell timber and other trees ripe for cutting and not planted or left standing for shelter or ornament. Previous to this enactment, the mortgagee in possession was, in the absence of an express power, entitled to cut timber only when the land was a defective security for his mortgage debt (*Withrington v. Banks*, Sel. Ch. Cas. 30), as is now his position with regard to mines (*Millett v. Davey*, 31 Beav. 470). The latter of the implied powers is that of granting leases of the mortgaged land by the mortgagor or mortgagee in possession given by s. 18.

The leases authorised by s. 18, which are to be good against mortgagee when granted by the mortgagor in possession, and good as against the mortgagor when granted by the mortgagee in possession are—(a) agricultural or occupation leases for any term not exceeding twenty-one years ; (b) building leases for any term not exceeding ninety-nine years to take effect in possession not later than twelve months after their date. The best rent with no fine must be reserved, except in building leases where a smaller or peppercorn rent for the first five years is permitted ; and each lease must contain a covenant to pay rent and a condition of re-entry for non-payment within at most thirty days. A counterpart of the lease must be executed by the lessee, and where the lessor is the mortgagor he must within a month of granting the lease deliver to the first mortgagee the counterpart. This power is not to enable the mortgagor or mortgagee to grant a longer lease than the former could have without it granted with the concurrence of the latter. And like the other implied powers, it is implied only in mortgages executed after 1881 and only in so far as it is not varied or excluded by the terms of the mortgage deed.



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Previous to this enactment the mortgagor not being owner in law could not grant a lease which would bind the mortgagee at law, and the mortgagee not being owner in equity could not grant a lease which would bind the mortgagor in equity. To grant a lease binding both at law and in equity, it was necessary that both mortgagor and mortgagee should join in granting it. This no doubt sometimes proved inconvenient to lessees who took leases from mortgagors in possession not knowing of the existence of the mortgage; but that this inconvenience could not be very great is perhaps shown by the fact that it was not usual to give the mortgagor express power to grant leases. The implied power here given is very wide, and in practice it frequently is modified or excluded, as far, at any rate, as the mortgagor is concerned. Sometimes the modification takes the form set out in our precedent—that is, the power to lease is excluded as far as house property is concerned, since an exercise of the power by the mortgagor might seriously diminish the security for the mortgage debt. Another frequent modification is to exclude the power to grant building leases. As to what is meant by an occupation lease, see *Brown v. Peto*, [1900] 1 Q. B. 346.

Finally, among the numerous powers and provisions implied in mortgages by the Conveyancing and Law of Property Act, 1881, there is one altogether for the benefit of the mortgagor. When a mortgage is executed the title deeds are handed over to the mortgagee as they would be to a purchaser of the land. Formerly the mortgagee was not under any obligation to produce them for the inspection of any one dealing with the mortgagor, unless special provision to do so was inserted in the mortgage deed. This where the mortgagee stood on his strict right and refused to produce made it very difficult for the mortgagor to establish his title to the land, and so was an impediment in the way of his selling

Right of mortgagor to production of title deeds.

Sect. 3. it as long as the mortgage continued. Now by s. 16 of the Conveyancing and Law of Property Act, 1881, it is enacted that “a mortgagor, as long as his right to redeem subsists, shall . . . be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee’s costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.” This section applies only to mortgages executed after 1881, and from these it cannot be excluded even by express stipulation to the contrary in the mortgage deed.

Two further doctrines in connection with mortgages must, on account of their importance, be noticed very shortly, although there is nothing in the precedent given which has any bearing upon them. The first is the doctrine of tacking ; the second, that of consolidation.

Tacking  
mortgages.

By tacking is meant the power which the law gives a mortgagee who has the legal estate to add a loan subsequently advanced on the security of the land to the debt due on his legal mortgage, and so entitle himself to have it paid along with the debt due on the legal mortgage and in priority to other advances made previously to it, of which he or the person who made the second loan had no notice when he made it. *Primâ facie*, the mortgagee who is secured by a legal mortgage has priority over all mortgagees who are secured only by an equitable charge, of whose mortgages the legal mortgagee had no notice when he advanced the mortgage debt. The maxim, *Where equities are equal the law shall prevail*, then applies. If such a legal mortgagee subsequently makes a further advance to the mortgagor without knowledge or notice of the existence of any equitable charges, or if any other person makes an advance without such notice and subsequently buys the legal mortgage or sells his debt to the legal mortgagee, then the person who has the legal

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estate is entitled to tack or join such subsequent debt to his legal mortgage and to claim to have both paid in full before any part of the mortgaged estate is devoted to paying off the equitable charge of which there was no notice when the "tacked" advance was made (*Marsh v. Lee*, 2 Vent. 337 ; 2 W. & T. 107). But a legal mortgagee is not entitled to tack any subsequent advance to his legal mortgage as against any equitable charge of which he had notice when he made the subsequent advance, even though he had entered into a contract to make the latter before he knew of the existence of the equitable charges (*West v. Williams*, [1899] 1 Ch. 132).

The other doctrine is what is called the doctrine of Consolidation of mortgages. By consolidation is meant the joining together of two or more mortgages on different properties belonging to the same mortgagor and holding each of them as security for all the mortgage debts. It arose where one person had either by original mortgage or by the assignment to him of different mortgages, several mortgages on different properties belonging to the same mortgagor, in all of which the period fixed for the repayment of the loan had passed. The mortgagor was not then entitled to redeem one of the mortgaged properties without redeeming them all (*Pledge v. Carr*, [1895] 1 Ch. 51).

This doctrine has now not so much practical importance as formerly, since by s. 17 of the Conveyancing and Law of Property Act, 1881, it is enacted that, as regards mortgages made since 1881 not containing any stipulation to the contrary, the mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him or by any other person through whom he claims on property other than that comprised in the mortgage which he seeks to redeem.



## PART V.

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## SECTION I.

## PECULIAR CHARACTERISTICS OF WILLS.

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“WELL said Littleton,” says Lord COKE (Co. Litt. 111 b), “that lands and tenements were devisable in burghes by custome ; for that at the common law no lands or tenements were devisable by any last will and testament, nor ought to be transferred from one to another but by solemn livery of seisin, matter of record, or sufficient writing ; but as Littleton saith that by certain private customes in some burghes they are devisable. But now, since Littleton wrote, by the statutes of 32 & 34 Hen. 8, lands and tenements are generally devisable by the last will in writing of the tenant in fee simple, whereby the ancient common law is altered whereupon many difficult questions and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen.”

The parliament which passed the Statute of Uses (*supra*, p. 9) was evidently at one with Lord COKE in deploring the alteration wrought in the common law by giving a freeholder the power of leaving his land away



**Sect. 1.** from his heir. In the preamble to that statute one of the mischiefs which necessitated its passing is stated to be the “divers and sundry imaginations, subtle inventions and practices” which “have been used whereby the hereditaments of this realm have been conveyed from one to another . . . by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited by sickness, in their extreme agonies and pains or at such time as they have scanty had any good memory or remembrance; at which time they being provoked by greedy and covetous persons lying in wait about them do many times dispose indiscreetly and unadvisedly their lands and inheritances.” It is, perhaps, worthy of note that this tendency to improvident disposition by will which Lord COKE and King Henry’s Parliament agree in deploring appears to have been a special affliction of landowners, who needed, apparently, statutory protection against it until the year 1891, when the Mortmain and Charitable Uses Act gave them, at last, that power to leave their lands to any object—even a charity—which the more discreet owner of personalty had possessed from very early times without injury to the commonwealth. In spite, however, of this weakness on the part of landowners, the people did not agree with parliament that the power to devise land was in itself an evil thing, and even in the rebellion in the North in 1536 they allege it as one of their grievances that by the abolition of uses of land they were deprived of the power of providing for their younger children. Consequently parliament, a few years after passing the Act to take away the power of devising land, had to pass another Act to restore it—the Statute of Wills (32 Hen. 8, c. 1, A.D. 1540). Since then several other Acts have been passed extending that Act, until by s. 3 of the Wills Act, 1837 (1 Vict. c. 26), all property is made disposable by will, and by s. 5 of the Mortmain and Charitable Uses Act,

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1891 (54 & 55 Vict. c. 73), the owner may, at his death, devise his land for charitable purposes as freely as he could during his life have granted it by deed, subject to this restriction, that such land must, as a rule, be sold within one year from the testator's death (*infra*, p. 288).

The instruments we have so far been considering have all been assurances of property from living persons to living persons: a will is an assurance of property from the dead to the living. The difference has naturally led directly and indirectly to many differences in the principles regulating their operation, interpretation and execution as compared with those controlling assurances *inter vivos*. The chief of these will now be stated shortly.

The first, and perhaps the most striking, of these points of difference is this: Deeds, as we have seen, operate from their execution (*supra*, p. 43); wills, on the other hand, operate not from their execution, but from the death of their makers. That is usually expressed by the phrase that a will is ambulatory till the death of the testator. In other words, until then it has no effect in law whatever (a). And until then the testator can at any time revoke or alter it by an instrument properly executed (Litt. s. 168). And as between different wills made at divers times where the later do not expressly revoke the earlier they impliedly revoke them in so far as they are inconsistent with them.

(1) It is ambulatory till testator's death.

(a) It was owing to this difference in the operation of gifts by will as compared with gifts *inter vivos* that made it possible at common law for a husband to devise land to his wife. A grant of land by deed or feoffment by husband to wife was void as they were one person in law, but as a devise did not operate till the husband's death the coverture was then determined and the wife could take as a *feme sole*. This, however, did not enable a married woman to make a will, since her will was invalid from its inception, she being *sub potestate viri* when it was made (Co. Litt. 112 b).

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(2) After testator's death it cannot be rectified.

This characteristic of wills which enables a testator, without the knowledge or consent of the beneficiaries under the will, to alter or amend its provisions, makes the necessity of elaborate provisions for possible contingencies not so necessary in a will in many cases as in a settlement by deed. This advantage is, however, more than counterbalanced by two other characteristics of wills as compared with deeds. The first of these is that once a will has come into operation by the death of the testator the court has no power to rectify it, however clearly it appears that the testator made his will under a misapprehension of fact. If a deed by some mistake as to the facts fails to carry out the clear intention of the parties, then a court of equity will undo the effects of such mistake by altering the instrument. It has no such power in the case of a will. By s. 9 of the Wills Act, 1837, a will must be in writing, and all the court can do is to interpret what the testator has put in writing. It can, indeed, set the will aside when its execution was induced by coercion, undue influence, or fraud, and it can prevent its being made itself an instrument of fraud—as, for example, when a legatee obtains a legacy under it on the express understanding that he will hold the legacy on a secret trust, the court will compel him to execute such trust, and it can strike out any clause which, it is clearly proved, was inserted without the testator's knowledge or wish (*In the Goods of Boehm*, [1891] P. 247). But it cannot receive evidence to show that the intention appearing on the face of the will was, through a mistake or misunderstanding on the testator's part, not the real intention of the testator, and, acting on this, direct that the will shall be rectified so as to carry out the real intention as it can in the case of a deed or other instrument operating *inter vivos*. See, as to this distinction, *Cowen v. Truefitt, Limited*, [1899] 2 Ch. 309).

(3) It speaks from testator's death.

The second of the characteristics last referred to, is that unless the contrary appears from the will itself, it is

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assumed that the property comprised in it is the property as it exists at the testator's death. This is what is meant by the phrase that a will speaks from the death of the testator. A deed, on the other hand, speaks from its execution. (See Underhill and Strahan's Interpretation of Wills and Settlements, p. 90.)

As an example of the operation of wills and deeds respectively, take this description of the property dealt with : " All that messuage called Blackacre and the lands occupied therewith," or the settlor's or testator's " lands, whether freehold, leasehold or copyhold, in the county of Northampton." In a deed, this first description would include only Blackacre as it was when the deed was executed, and the second description, whatever lands the settlor then had in Northamptonshire. In the case of a will, however, the first would include any additions made to the lands occupied with Blackacre by the testator after the date of his will, and the second, all lands in Northamptonshire subsequently purchased or inherited by him.

The rule that a will speaks from the death of the testator always obtained as to pure personalty comprised in it ; but until the Wills Act, 1837, it *primâ facie* did not obtain as to land. It has, as we shall see, no application to the persons taking the property under the will (*infra*, p. 281).

There is a fourth respect in which a will operates as regards freehold and leasehold land comprised in it in a way different from a conveyance by deed. A will does not convey such land direct to the devisee as a conveyance by deed conveys the land comprised in it direct to the grantee. On the death of the testator, the freehold and leasehold lands belonging to him vest in the executors of his will, and it is only on their consenting to the devise or bequest of it, that the persons to whom it is left obtain any legal interest in it. (4) It does not convey the property direct to the beneficiary.

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This principle has always applied to the case of leaseholds and pure personalty. A will of these—or a *testament* in the strict sense—was always regarded, as testaments were regarded by Roman law, as a form of universal succession, and not as a conveyance by the testator. That view has now been adopted by the Legislature as regards wills made after 1897, of realty situate in England (Land Transfer Act, 1897, s. 1). The Act does not extend to Ireland, and copyhold land does not come within it.

These four characteristics may be said to be due to the nature of a will as an assurance between the dead and the living. Three other characteristics arose through the leniency with which the court has always interpreted wills. This leniency is attributed to the consciousness of the courts of the fact that wills must often in the nature of things be drafted under very adverse circumstances of time and place. Whether, however, this same leniency has proved a benefit to the average testator, is open to some question, for it has led to that most pernicious popular belief that a will is a legal document which differs from all other legal documents in this respect, that it can be drafted by a person destitute of legal knowledge. This delusion, by leading testators to draft their own wills or to rely on the doctor or parson to draft them for them, has resulted not merely in the dissipation of many an estate in law costs, but also in the more effectual frustration of dying men's wishes than would have been wrought by the most stringent construction of wills—assuming that such a construction would have induced testators to have their wills (as they have their conveyances) drafted by lawyers in all cases save where the emergency is so pressing as to leave no opportunity of securing legal aid.

(5) To pass  
heritable  
estates words  
of inheritance

The first of these characteristics due to leniency of interpretation is this: To pass an estate of inheritance in land, no words of inheritance need be used in marking out

the estate. This, no doubt, is *primâ facie* a perfectly sensible rule. The rule applicable to deeds, namely, that unless the limitation be to the grantee and his heirs, or to him in fee simple, only a life estate will pass, is purely technical. And this rule is only a particular application of the principle applied generally to the interpretation of wills, namely, that technical expressions may be dispensed with on all occasions. If testators who draw their own wills, took proper advantage of this principle, their intentions would be less frequently defeated than they now are ; but they *will* use technical expressions which they do not understand. Thus they constantly leave property to a person for life and then to "his heirs." Where the property is realty, their clear intention is defeated, since the effect of the rule in *Shelley's Case* (*supra*, p. 131), is to give to the intended life tenant the fee simple. Where the property is personalty, since the word heirs has no proper meaning in reference to it, the puzzle is to find out whom the testator meant by the life tenant's heirs.

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are not  
needed.

When a will is drafted by a lawyer, the interests given under it are, of course, set out in the same technical manner as if the instrument were a deed.

The second characteristic is, or at any rate once was, of more importance. As has been pointed out in dealing with settlements, executory interests can, in the case of deeds, be created only by way of use. If a fee simple is limited directly by deed to A. for life, and afterwards to such son of A. as shall first attain twenty-one, in fee simple, as long as A. has no son aged twenty-one, the remainder is and must be a contingent remainder. Moreover, it is not helped by the Contingent Remainder Act, since it is not a contingent remainder which would be good as an executory interest if it had not a preceding estate of freehold to support it: A direct limitation to the first son of A. who attains twenty-one without a life estate to A., would be

(6) To create  
executory  
interests  
limitations  
need not be  
by way of  
use.



**Sect. 1.** bad as a limitation *in futuro* (*supra*, p. 130). This, however, never was the case as regards wills. Wills originally dealt only with uses of land: when the Statute of Wills made it possible for them to deal with the legal estate, the courts continued to interpret them as if they still dealt only with the use or equitable interest. Accordingly, executory interests can be created by direct limitation. In the example above given, the limitation to A.'s son would, in a will, be a contingent remainder, which would be good as an executory interest if it had not had a preceding freehold to support it, and, accordingly, it now would not fail in case A. died before his son attained twenty-one.

Executory  
interests in  
leaseholds.

In this connection, a further point may be noted. It is possible to create by will executory interests in leaseholds. As we have seen, the Statute of Uses only operates in the case of freeholds. Accordingly, if leaseholds are limited by deed by way of use, the legal estate remains in the grantee to uses, and the beneficiaries take only equitable estates (*supra*, p. 10). But in the case of leaseholds limited in successive interests directly by will, the beneficiaries take the legal, as well as the beneficial, interest. Future legal interests in leaseholds so created are usually called executory bequests.

(7) Limita-  
tions are not  
within the  
Statute of  
Uses.

And this brings us to the third of these characteristics. The Statute of Uses has no imperative application to limitations contained in wills. That seems now to be settled law, though no very satisfactory reason has ever been given why the statute should not apply to limitations by will as much as to limitations by deed operating under the Law of Property Act, 1845. However, it seems certain that if freeholds are devised, for example, to A. in trust or to the use of B., whether B. will take the legal estate or not will now depend on the intention of the testator and not on the effect of the statute. At the same time, where the



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testator, in creating estates in freehold by will, uses the same expressions as he would were he creating them by deed—which is always the practice where settlements are made by will—the court will consider this a sufficient indication that he intended the will to operate in the same way as it would do if it were a deed. In other words, he is considered to have adopted the machinery of the Act for the purpose of limiting the interests arising under his will (*Doe v. Field*, 2 B. & A. 564). ●

The last characteristic which may be mentioned here is (8) Execution due to the necessity of guarding against forgery, which, in the case of a will, is much more urgent than in that of a deed, since a will does not come into operation until the sole party to it is dead. To give this security the law insists that it shall be executed in the presence of two witnesses both present at the same time and attested by them in the presence of the testator, and in the presence of each other, such attestation being shown by their signing their names on the will. Formerly this formal execution was necessary only in the case of wills of realty ; but by s. 9 of the Wills Act all wills must now be executed in the same way (see *infra*, p. 287).

(8) Execution  
must be  
attested by  
two  
witnesses.

## SECTION II.

## A SHORT FORM OF WILL.

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Variety of form and substance of wills.

WILLS vary more in form and substance than any other kind of assurances. This arises partly from the fact, that while other assurances deal as a rule only with specific property, a will deals with the testator's whole estate. It arises chiefly, however, from the infinite variety of testators' intentions and circumstances. One testator desires to leave everything to the absolute discretion of his widow, in which case a few lines on a sheet of notepaper is sufficient. Another wishes to make provision for his descendants even unto the third and fourth generations, when the will has to be drawn on practically the same lines as a settlement by deed. Another wants not merely to provide for his descendants, but to provide for the carrying on of his business by his executors, or for its transfer as a going concern to his sons ; and to do this, further clauses, sometimes of a very complicated kind, must be added. And in a hundred other ways variety of intentions and circumstances require variation in the terms of the instrument.

In consequence of this variation in form and substance there is no kind of conveyancing in which precedents are of

so little, and practical experience is of so much use, as in the drafting of wills. The form which is most common in practice, where the intention is to provide for the testator's family, is very much the same as a personal settlement with certain clauses—such as the covenant to settle after acquired property and such like, which would have no meaning in a will—omitted, and a few clauses—such as legacies to old servants, memorial gifts to old friends, and such like, which would have no meaning in a settlement by deed—inserted. When the will is in this form or in the form of a strict settlement, all the powers implied by the Settled Land and Conveyancing Acts in settlements by deed are implied in it, and, generally speaking, the exposition which has been given of the clauses in a settlement by deed applies equally to it.

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The commonest form very similar to a personal settlement.

To set out these and comment on a settlement by will would be merely to repeat to a great extent what has already been said. We will, therefore, choose a very short precedent which, though not quite so often used in practice, yet raises more of the points requiring particular exposition.

This Will made the twentieth day of April, 1900, is the last Will and Testament of me, Richard Roe, of Beaulieu Hall (lately known as One Horse Farm), in the parish of Morton Pinkney, Northampton, and of Chatsworth, Clapham Common, London, S.W. I hereby revoke all other Wills.

A short form of will in paragraphs.

1. I hereby appoint my wife, Mrs. Matilda Jane Roe, my son, Albert Edward Howard Roe, and John Dorey, of 3,003, Bedford Row, in the City of London, solicitor, (hereinafter called my trustees), to be the executors and trustees of this my Will.

Appointment of executors.

2. I give and bequeath the following specific legacies.  
(a) To my wife all the jewels, trinkets, plate, furniture, linen, glass, china, books, pictures, and all other the

Specific legacies.

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articles of personal or domestic use, which shall at the time of my decease be in or about my aforesaid dwelling-house, known as Chatsworth, save only my portrait in oils by Smudger-Brown, R.A., and the service of silver plate presented to me by the Worshipful Society of Company Promoters, which I hereby bequeath to my son Albert Edward Howard, and request him to make of them heirlooms in our family.

(b) To my son-in-law, John Doe, Esquire, of Long Acre, Morton Pinkney, the gold watch and chain I always wear, and the Chippendale cabinet bought by me in Wardour Street, London, and now in the drawing room of my mansion house, Beaulieu Hall, Morton Pinkney.

Pecuniary  
legacies.

3. I give and bequeath the following pecuniary legacies.

(a) To my wife £300 as a mark of affection merely, she being already amply provided for under the Will of her late father.

(b) To my daughter Rosa, wife of John Doe, Esquire, £300 as a mark of affection merely, she being already amply provided for under her marriage settlement by property appointed to her by my wife and me jointly.

(c) To my friend Mr. John Dorey £100 as a mark of esteem and also in consideration of his consenting to act as executor and trustee of this my Will.

Discretionary  
trust of a  
pecuniary  
legacy.

(d) To my trustees £10,000 upon trust to invest the same in the names of the said trustees in or upon any stock, funds, or securities, in or upon which trustees may by law invest trust funds. And upon further trust that my trustees shall, in their absolute discretion, from time to time during the life of my son Augustus Fitzwilliam Roe, now residing at Buluwayo, South Africa, or during such shorter period or periods, either continuous or discontinuous as they shall think fit, pay all or any part of the income of the said sum of £10,000 and the investments thereof unto, or apply the same for the maintenance of, all or any of the following persons, namely, the said Augustus Fitzwilliam Roe, any wife he has married or shall marry, and his children or remoter issue for the time

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—

being in existence, whether minors or adults, in such proportions and manner as my trustees shall in their absolute and uncontrolled discretion from time to time think proper, and subject to the discretionary trust lastly hereinbefore contained shall accumulate the said income, or so much thereof as shall not be applied under such discretionary trust, and invest the same and hold the investments upon the same trusts as are hereby declared of the said sum of £10,000. And after the death of the said Augustus Fitzwilliam Roe shall pay the income of the said trust fund to his widow, if any, during her widowhood for her separate use, and so that she shall not during the life of the said Augustus Fitzwilliam Roe have power to charge or dispose of such life interest by way of anticipation. And after the death or marriage of such widow, if any, shall stand possessed of the said trust fund, in trust for all or any the children or child of the said Augustus Fitzwilliam Roe, who shall be living at my decease or born afterwards, and who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under it, and if more than one in equal shares, and in default of such children or child, in trust for my son Albert Edward Howard absolutely.

4. I direct my trustees to purchase from any public Annuities. insurance or annuity company the following annuities.

(a) For my late clerk, John Smith, an annuity of £40.

(b) For Anne Roe an annuity of £40.

I direct that such respective annuities are to commence from my decease, and to be payable by equal quarterly payments, the first payment to be made three months after my death, and until purchase of them, my trustees shall pay like annuities out of my residuary estate to the said John Smith and Anne Roe.

5. I declare that all the said legacies and annuities shall be delivered and paid free of all death duties, and I hereby charge the pecuniary legacies and annuities, and

Legacies to  
be paid free  
from death  
duties

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and charged  
on the real  
estate.

the death duties payable thereon, on my real estate hereinafter devised in case of deficiency of my personal estate, with power for my trustees to raise the amount of such deficiency, together with the costs of raising the same, by sale or mortgage of such real estate or any part or parts thereof, and so that any such mortgage may be in fee simple, or for any term of years, and with or without a power of sale, and to execute and do such assurances and things as may be necessary or proper for effectuating any such sale or mortgage. And I declare that no purchaser or mortgagee shall be bound to ascertain whether such deficiency of my personal estate exists, or whether more money than is required is raised, or to see to the application of the money raised, and that the declaration in writing of my trustees that no further sum can be required to be raised under the present power shall be conclusive in favour of any purchaser, mortgagee, lessee, or other person acquiring any interest in the said real estate or any part thereof.

Specific  
devise.

6. I devise my mansion house of Chatsworth, Clapham Common, London, S.W., with the outbuildings and lands occupied by me therewith, to my wife during her widowhood or until she cease to make it her principal place of residence.

General  
residuary  
bequest and  
devise.

7. I bequeath and devise, subject to and after payment out of my personal estate, or in case of deficiency out of my real estate, of my funeral and testamentary expenses, debts, legacies, and annuities bequeathed by this my Will, or any codicil hereto, and the death duties on such legacies and annuities, all the residue of my personal effects and all my real estate of every tenure and wherever situate, save as hereinbefore disposed of (including as well real as personal estate over which I shall at my decease have any power of disposition by will) unto and to the use of my son Albert Edward Howard Roe, his heirs, executors, administrators, and assigns absolutely.



As Witness my hand this day and year hereinbefore mentioned, **Sect. 2.**

RICHARD ROE. Testimonium.

Signed by the said Richard Roe as his last Will in the presence of us, the undersigned, both being present at the same time, who, at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses. Attestation clause.

MOSES WHITE,  
Curate of St. Barnabas,  
Cold Ashby, Northamptonshire.

FRANK SMART,  
Solicitor's Clerk,  
2,000 Rodney Street, Pentonville,  
London.

This is a Codicil made this 24th day of April, 1900, to the last Will and Testament of me, Richard Roe, of Beaulieu Hall, Morton Pinkney, Northamptonshire, which Will bears date the 20th day of April, 1900: Whereas by my said Will, I have made no provision for the erection and maintenance of a proper memorial to myself and my wife when it pleases God to call us away, I hereby bequeath to the trustees of my said Will, £1,000 for the erection of such a memorial in the parish church or churchyard of Morton Pinkney, Northamptonshire, and I bequeath to the churchwardens of the parish of Morton Pinkney and their successors, the sum of £1,000 in trust to invest the same and to devote the income thereof to the general repair of the church and churchyard, and whatever other charitable object within the said parish they in their discretion shall approve, and I commit to their care the said monument, which they shall maintain in good repair, and should they at any time fail to do so, the said sum of £1,000 is to vest in the trustees of the Primitive Methodist Chapel of Morton Pinkney absolutely in trust for the maintenance of the said chapel, and in all other respects I confirm my said Will. As Witness my hand, Codicil.  
Charitable bequest.

RICHARD ROE.



Sect. 2.

Signed by the said Richard Roe as a Codicil to his last Will and Testament in the presence of us, the undersigned, both being present at the same time, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

ELIZABETH ELDERBY,

Housekeeper,

Beaulieu Hall, Morton Pinkney.

2

ROBERT GREENHOUSE,

Head gardener,

Beaulieu Hall, Morton Pinkney.

Observations  
on precedent.

This form of will is, as has been said, a very simple one only adapted to cases where all the children of the testator are of full age, and where the testator has no desire to limit the discretion or power of his children to deal with the property he leaves them. This state of affairs is not very common, and more often than not a testator in disposing of his property by will either has to take into consideration the fact that some of his family are minors at the making of the will, or is desirous to “tie up” for the benefit of his remoter descendants the property he at his death shall possess. In these cases the form given above is followed generally as far as the earlier part is concerned—that is, most conveyancers in the first paragraph appoint the executors and trustees, setting out in the second the specific legacies (if any), in the third the pecuniary legacies if any, dealing firstly with the absolute and secondly with the settled legacies, in the fourth the annuities (if any), in the fifth the charge of general legacies on the realty and the direction to pay the death duties out of the residuary estate (if that is the testator’s intention), and in the sixth the specific devises. The seventh, where the settlement is personal, contains a general residuary devise and bequest to the trustees, and then follow clauses declaring a trust for sale, trusts

**Sect. 2.**  

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of the income and trusts of the corpus followed by clauses giving powers to postpone sale, to lease lands until sale, and to settle questions. All these follow very closely the corresponding clauses in a settlement by deed. Where the will is intended as a real settlement, the divergence between it and a settlement by deed begins in the same way at what in our precedent is the seventh paragraph, and thereafter follows closely a real settlement by deed (*supra*, p. 146). ●

SECTION III.

CLAUSES OF A WILL.

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How wills are usually drafted.      OUR precedent shows that there are three points in its drafting in which it differs from any of the precedents of assurances by deed.

(1) With punctuation      The first of these is that our precedent of a will is punctuated like any other writing. This is not a peculiarity of wills ; all other legal documents not under seal, like agreements for sales or for leases, equitable mortgages or charges under hand only, etc., are also punctuated. It is rather a peculiarity of deeds that in drafting them no punctuation is used.

This use of punctuation in wills has the effect of rendering unnecessary the repetition of a testatum at the beginning of a new sentence as in a deed. It also, of course, influences the meaning to be put upon the words of wills. Accordingly, where it is clear that the meaning

of a sentence depends on its punctuation, the court, in construing it, will, if necessary, send to Somerset House for the original will in order to make certain that as to punctuation the probate copy exactly corresponds thereto (*Manning v. Purcell*, 7 D. M. & G. 55). Sect. 3  
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The second point is that wills are now usually drafted in numbered paragraphs. Nowadays, it is not uncommon to draft deeds in the same way; but there is this difference in the practice, that while deeds are not drafted in paragraphs unless they are particularly complicated, wills are drafted in paragraphs unless they are particularly simple. (2) In paragraphs.

It is sometimes objected to drafting wills in paragraphs that where the paragraph ends in the middle of a line, and the remainder of the line is consequently left blank, this open space affords an opportunity of altering the will. This is quite true; but the space should not be left open. A black line, drawn by the engrosser, will fill it quite as effectually as any writing. And there can be no question that the division into paragraphs conduces, even more than the framework on which deeds are drawn, to clearness of expression and ease of reference.

The third point is that wills are invariably drafted in the first person. Just as assurances by deed may be drafted in the first person, so may a will be drafted in the third person; but in practice it is as uncommon to meet a will drafted in the one way as an assurance by deed drafted in the other. Accordingly, the conveyancer should follow the practice, for LITTLETON's sage saying that that "forme is the most sure making" which "is the most commonly used," applies to wills as well as deeds. (3) In the first person.

The opening sentence of a will corresponds to that of an indenture, in that it sets forth the nature of the Exordium  
of a will.

**Sect. 3.**

instrument itself, and a description of the person or persons who make it. Almost invariably, however, there is only one such person (though joint wills by husbands and wives are not unknown) ; and many conveyancers following the analogy of deeds made by one person—deeds poll—put the date of execution not in the opening sentence but in the testimonium where it is placed in deeds poll (*supra*, p. 90). I think, however, that it is the better practice to follow the analogy of an indenture throughout once you begin with it.

Para. (1)  
Appointment  
of executors.

Then in our precedent follows the appointment of executors. Again practice varies as to the place where this clause should be, some putting it after the opening sentence, others immediately before the testimonium. Again, in my opinion, it is desirable to place it as nearly as possible in the same position as the nomination of the trustees in a settlement is made, since it enables the draftsman to avoid the repetition of the names of the executors by explaining at the commencement of the will that the persons named as executors shall hereinafter be called his executors or trustees, as the case may be.

Office of an  
executor.

The office of executor is essential to a will. Formerly it was regarded as so essential that if no executor were appointed in the will, the will itself was invalid (*Wms. Ex.* p. 7). The court, acting on the same principle that it applies to trusts, namely, that it will not allow a trust to fail for want of a trustee, will not now permit a will to fail for want of an executor ; and so if an executor be not appointed by the will, it will appoint a person itself to carry out the provision of the will. The person so appointed is called an administrator with the will annexed. And formerly, also, an executor's office was limited to the administration of the testator's personalty. At common law wills operated only on personalty—realty, as we have seen,

Sect. 3.

not being devisable. When the Legislature extended the power of testation to realty it left the position of the executor as it was. Accordingly, while on the death of a testator all his personalty including chattels real vested in his executor, his realty vested in those to whom he had devised it, or if it were not devised, then in his heir. Now, however, as we have seen (*supra*, p. 258), all his property, both real and personal save copyholds, vests in his personal representatives, who in spite of any devise are entitled to sell all or any part of it, for the purpose of administering the estate of the testator (Land Transfer Act, 1897, s. 2 (2)).

In the second paragraph of our precedent are set out the specific legacies given by the testator, Mr. Roe. A specific legacy is the gift by will of an article specifically and individually described. The peculiar characteristic of this gift is its liability to be *adeemed* by the testator's parting with it before his death. By *ademption* is meant, shortly, the destruction or revocation of the legacy. This characteristic makes this form of legacy one not to be used except in cases of necessity. Where the testator's desire is (as in our precedent) to leave certain specified articles to certain persons, then of course this form of gift is inevitable. But occasionally it is used not as a means of giving specific articles in this sense, but of making provision for certain relatives. Thus testators not infrequently desire to divide up their property among their relatives in this way: "To my son John my stock in the North Western Railway Company, to my daughter Mary my Indian Government stock, and to my sister Ann my consols." These all are specific gifts, and should he part, even for the purpose merely of reinvestment, with any of them, the result would be to revoke or *adeem* the bequest of that particular stock, and leave the legatee unprovided for. Conveyancers accordingly always discourage specific

Para. (2).  
Specific  
legacies.

**Sect. 3.** legacies save where the object is to give some specific and perhaps cherished article to someone whom the testator wishes to preserve it, or where his desire is to maintain his home as “a going concern” by leaving to the person who occupies, or is intended to occupy it, all the furniture and outfittings it contains at the time of the testator’s death.

Though specific legacies are regarded unfavourably both by conveyancers and the court—the latter never construes a legacy to be specific unless it has no other alternative—yet they are not without their advantages. Thus they are not liable to abate (*i.e.*, to be reduced) or to fail owing to a deficiency of assets to meet the testator’s debts until all the personal estate not specifically bequeathed is exhausted. Again, they may be expanded. If in the example given in our precedent Mr. Roe before his death added to the furniture of Chatsworth, the furniture so added would be included in the gift to his widow. Again, when the legacy is of a specific fund bearing interest or income, the interest or income from the death of the testator belongs to the legatee. And to cause ademption the thing must be actually parted with by the testator before his death. If it is merely pledged or charged with a debt, the legacy is not adeemed even *pro tanto*; the legatee is entitled to have it redeemed at the expense of the testator’s general estate (*Knight v. Davis*, 3 M. & K. 358). The same rule once applied to specific gifts of land, but now by Locke King’s Acts where land is specifically devised, in the absence of any contrary intention expressed in the will the devisee is not entitled to have any debt or charge upon it paid off at the expense of the testator’s general estate.

**Precatory trusts.**

Two points arising on the first of the two specific bequests as set out in our precedent may just be noticed. The testator leaves his portrait and his service of plate to his son, and requests him to make heirlooms of them.



Sect. 3.  

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Formerly, in construing gifts, whether specific or otherwise subject to such requests as these, the courts were inclined to regard the legatee as merely a trustee for the purpose of carrying out the object which the testator desired. In other words, the request of the testator was regarded as an imperative direction binding in law upon the legatee (*Knight v. Knight*, 3 Beav. 173). As the direction was expressed as a request the trust was called a *precatory* trust. This tendency the courts no longer show. In order now that a request may become a binding direction on the legatee, it is necessary that such an intention shall appear on the face of the will (*Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370). *Primâ facie* such a gift gives the donee both the legal and equitable ownership of the thing given, and the court will not cut down this ownership unless it is clear that the donor intended not to express merely a desire as to what the donee should do with the gift, but a direction that that should be done (*Hill v. Hill*, [1897] 1 Q. B. 483).

The second point is as to the meaning of "heirloom." Heirlooms. In the bequest in our precedent the testator uses the term in its popular sense. He means that the son should not part with the articles in question, but should settle them to accompany the freehold estate in the way chattels real are so settled (*supra*, p. 193), or at any rate in some way or other which would ensure their transmission to his descendants. That, however, is not, properly speaking, what is meant by an heirloom. By heirloom is meant, technically, a chattel which by common law or by local custom goes to the heir of its owner. COKE gives examples of both heirlooms at common law and heirlooms by local custom. "If a nobleman, knight, esquire, etc., be buried in a church and have his coat armor, and pennons with his armes and such other ensignes of honour as belong to his degree and order, set up in church, or if a gravestone or tombe be laid or made, etc., for a monument of him, in this case albeit the

**Sect. 3.** freehold of the church be in the parson and that these be annexed to the freehold, yet cannot the parson or any take them or deface them but he is subject to an action to the heire and his heires in the honour and memory of whose ancestor they were set up. . . . And note that in some places chattels as heireloomes (as the best bed, table, pot, can, cart and other dead chattels moveable) may go to the heire . . . . but the heireloome is due by custome and not by the common law" (Co. Litt. 18 b).

Para. (3).  
General or  
pecuniary  
legacies.

The third paragraph of our precedent sets out the general or pecuniary legacies. A general or pecuniary legacy is simply a sum of money. It is not liable to be adeemed. The general rule of law as to such legacies is that (in the absence of any sufficient indication of a contrary intention) they are payable out of the estate not specifically bequeathed (*Robertson v. Broadbent*, 8 App. Cas. 812). They are liable on a deficiency of assets to pay debts to abate immediately after the exhaustion of the residuary personal estate, and of the realty undevised or devised for the purpose of paying or charged with the payment of debts (see *infra*, p. 286). General legacies bear interest only from one year after the testator's death.

Demonstra-  
tive legacies.

There is a third kind of legacies called demonstrative. They are pecuniary legacies payable out of a certain fund or property, as, for example, a legacy of 1,000*l.* "payable out of the money owing to me under" a certain mortgage. They partake of the nature of both specific and general legacies. They are general in that they are not liable to ademption by the testator's parting with the specific fund out of which they are payable before his death. They are specific in that they are not liable to abate as long as the fund or property out of which they are payable remains.

Discretionary  
trust.

One of the general legacies is a legacy to the trustees of the will upon a discretionary trust for the benefit of a

ne'er-do-well son and his family. A discretionary trust has already been discussed (*supra*, p. 207), and it is only necessary to say here that frequently such trusts are so drafted as to give the trustees a discretion to devote the principal as well as the income of the legacy to the benefit of the son or his family during his life. No doubt this occasionally proves beneficial: the objection to it is that it leaves the trustees open to pressure from the son, and not infrequently the result is that he, by habitually getting himself into money troubles and inducing the trustees to get him out of them, effectually causes the dissipation of the larger part of the principal before his death, thus defeating the intention of the testator to make the provision which the son should have made, for the latter's children.

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As to the meaning of the term "wife" and the necessity of making it clear that not merely the wife at the date of the will, but any subsequently taken wife is to be included within that term, see *supra*, p. 171.

The gift over under the trust on the death of the survivor of the son and his wife is to the son's children. This is what is called a gift to a class, and the rules for ascertaining what is a class and who are the persons who are included in a gift to a class, are among the most important matters connected with the co-related subjects of drafting and construing wills.

Gift to a  
class.

It is impossible to discuss here in any detail these rules. The more important, however, from the draftsman's point of view, may be shortly stated. (The reader will find an attempt to evolve some general principles out of the chaos of decisions on the subject in Chapter III., Part II., of Underhill and Strahan's Interpretation of Wills and Settlements.)

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What is a  
class.

First, then, as to what amounts to a gift to a class. As said by LINDLEY, M.R., in *Re Moss, Kingsbury v. Walter* ([1899] 2 Ch. 314, at p. 317), there is probably not a single decision in the books on this point as to which a decision practically to the opposite effect might not be found. This confusion of authority seems to have arisen from attempts to make the definition of a class as that term is understood in construing wills conform to the scientific definition of a class. To constitute a class from the true or scientific point of view all the persons or things forming it must have some common attribute which distinguishes them from other persons or things. But in construing wills there is no such need for a common attribute. The sole question then is, what was the testator's intention as expressed by the words of his will? If he intended certain persons to take as a class, as a class they shall take even if they have no attribute in common except their common humanity.

Thus gifts to the "children of A. and B. respectively" (*Fletcher v. Fletcher*, 9 L. R. Ir. 301), to C.'s nephews and nieces who "were living at the time of C.'s decease, except A. and B." (*Dimond v. Bostock*, 10 Ch. D. 358), and to "A. and the children of B." (*Re Moss, Kingsbury v. Walter, supra*) have been held to be gifts to classes, though in none of these cases does there seem to be any distinguishing attribute common to the persons forming the so-called class.

Who are  
included in a  
class.

Once it is clear that the gift is in law, a gift to a class, four rules become applicable to it. The first is that where the gift is to the class generally the death of one or more members of the class before the testator will not cause any lapse even though the members take the gift as tenants in common. Thus, in a gift of 1,000*l.* to A. and the children of B. in equal shares, on the death of A. before the

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testator the children of B. take the whole 1,000*l.* among them (*Re Moss, Kingsbury v. Walter, supra*). In the next place, whether the gift is general or specific, a mistake as to the number of the class will not prevent every member of it from taking. Thus, in a gift of 100*l.* to each of the four children of A., if in fact A. has six children, each of the six will become entitled to 100*l.* (*Daniell v. Daniell*, 3 De G. & Sm. 337), and if the gift had been 1,000*l.* to the four children of A. equally, each of A.'s six children would be entitled to an equal share of the 1,000*l.* (*In re Groom, Booty v. Groom*, [1897] 2 Ch. 407). The other two rules bring out very sharply the difference between the principles applying to the subject-matter and to the objects of gifts by will respectively. We have already seen, that as regards the subject-matter of gifts, save where that is specifically described, a will now speaks from the death of the testator (*supra*, p. 260). As regards the objects of gifts where these are not specifically described (*i.e.*, where they take not as individuals but as classes), who will be included in the class depends on the nature of the gift. If the gift be specific to each member of the class, then no person who was not a member of the class at the death of the testator can take. Thus, if the gift be of 100*l.* to each of the "children of A. on his or her attaining the age of twenty-one,"\* only children of A.'s who were born at the testator's death can take on attaining twenty-one (*Rogers v. Mutch*, 10 Ch. D. 25). On the other hand, if the gift be general, who will come within it depends upon whether it is immediate or postponed. If the gift be simply to the children of A., for example, it is immediate, and if at the testator's death A. has children, then those children alone are entitled, and children born to A. after the testator's death are excluded (*Viner v. Francis*, 2 Cox. 190). If, however, the gift be—as in our precedent—to A. for life, and on her death to her children, then on the testator's

**Sect. 3.** death the gift over vests in the children then born, but on the birth to A. of any subsequent child the gift opens to admit him to a share (*Oppenheim v. Henry*, 10 Hare, 441). The same rule applies, generally speaking, where the gift is postponed in any other way. The period when it is to come into operation—in our example this is at A.'s death—is called the period of distribution, and every person becoming a member of the class before that period is *primâ facie* entitled to share in the general gift to the class. (See *per* STIRLING, J., in *Re Mervin*, *Mervin v. Crossman*, [1891] 3 Ch. 197, at p. 202).

**Para. (4).**  
Annuities.

After the general or pecuniary legacies come the annuities. There are three ways of securing an annuity. The first is by making it a charge either on the corpus or the income of the residuary estate. Where this mode is adopted the distribution of the residuary estate cannot take place until the determination of the annuity. The second is by charging it upon a specific portion of the estate, such as certain land devised to a particular person subject to the annuity. The third is by directing or authorising the executors to purchase an annuity either from the Government or from an annuity or insurance company. This, perhaps, is on the whole the most convenient mode in all cases where it is desired to wind up the testator's estate within the year following the testator's death, or what is called the executor's year.

When the executors are directed to purchase an annuity the annuitant is entitled to demand the value of the annuity in lieu of the annuity itself, unless the executors are constituted trustees of the annuity, and it is made subject to a condition of forfeiture (with gift over) on any attempt on the part of the annuitant to alienate it (*Power v. Hayne*, L. R. 8 Eq. 262).



## CLAUSES OF A WILL.

Annuities in the absence of an expressed intention to the contrary commence from the death of a testator ; but they are regarded as legacies, and, as in the case of legacies, the executors are not obliged to make any payment in respect of them until the end of the executor's year, when the legacies become payable. Accordingly, where it is desired that payments in respect of them should be made before the end of the executor's year, a special direction to that effect should be inserted in the will. **Sect. 3.**  
Commence-  
ment of  
annuities.

It will be noticed that in our precedent no words of limitation are annexed to the gifts of annuities. No such words are necessary when the annuities given arise under the will and are meant to subsist only so long as the annuitants live, since by construction every annuity arising under a will is, unless the contrary appears, taken to be for the life of the annuitant only (*Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222). This rule, however, does not apply to the bequest of an annuity or rentcharge *in esse* when the will was made. There the general rule applicable to wills—that a gift is absolute unless it is expressly limited—applies, and the annuity will go to the legatee for the remainder of its duration unless it is clear that the testator intended him to enjoy it for his life only. Duration of  
annuities.

Paragraph 5 of our precedent makes the death duties on the legacies and annuities payable out of the residuary personalty, and charges the realty with the payment of both of these in aid of the personalty. The first of these provisions is now usually inserted, since it facilitates the winding-up of the estate, and allowance can be made for the duty payable in this respect, when fixing the amount of any legacy. The second is necessary where there is any likelihood of the personalty being insufficient to pay the debts and legacies in full. Formerly it was usual to Para. (5).  
Charge of  
death duties  
and legacies  
on realty.



**Sect. 3.** charge the debts as well as the legacies on the realty, because though the realty was liable for the testator's debts, the executors could not sell it to pay them unless they were charged upon it, or an express power of sale were given them by the will. Now under the Land Transfer Act, 1897, the realty vests in the executors, who can sell it in order to pay the testator's debts. But the realty is not liable for the payment of legacies unless expressly made so by the will itself.

Para. (6).  
Specific  
devise.

The devise to the widow of the testator of the testator's town house Chatsworth, is a specific devise. The difference between a specific devise and a general or residuary devise is not so important as that between a specific legacy and a general or residuary legacy, since though a specific devise is liable to total or partial ademption, yet as regards the order in which a testator's estate becomes liable for the payment of debts, a general devise ranks as if it were specific (*Lancefield v. Iggulden*, L. R. 10 Ch. App. 136). Thus, while personalty bequeathed by way of residue only is primarily liable for the payment of testator's debts, and general legacies are liable after the exhaustion of it and of any realty not devised at all or devised for or charged with payment of debts, a residuary devise, like a specific legacy or devise, only becomes liable when all the other property of the testator has been exhausted. The only other parts of his estate which have an advantage over these in this respect, are property over which the testator has exercised a general power of appointment and the paraphernalia of his widow, neither of which, though part of his estate, can justly be considered part of his property.

Devise of  
"occupation"  
of a house.

One other point in connection with the specific devise set out in our precedent. Very often where a testator wants to give his widow his house for her personal use

Sect. 3.  

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during her life, he devises her the “occupation” or “free use” of it for her life. The effect of this is to give her simply a life estate which she may dispose of the day following his decease (*Rabbett v. Squire*, 4 De G. & J. 406). If it is intended that the devisee should have the house only so long as she personally resides in it or uses it as her principal place of residence, a condition must be attached to the devise to that effect, with a gift over on her ceasing to reside in it. It may be added that it would seem that the devise of the “occupation” of a house, without words of limitation, only carries a life estate (*Coward v. Lakeman*, 60 L. T. 1).

The last paragraph of our precedent contains a general residuary devise and bequest. Such a gift “passes everything not disposed of, whether the testator has attempted to dispose of it, or whether the disposition fails by lapse or any other cause” (*per* LOPES, L.J., in *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348, at p. 359). Thus it carries all void legacies and devises, all lapsed legacies and devises, and all land and other property over which the testator had at his death a general power of appointment, and which he has not otherwise appointed (ss. 25, 27, Wills Act, 1837). And where it contains, as it does in our precedent, a reference to property over which the testator has any right of disposition, it also carries any property over which the testator had a special power of appointment, in so far as he could exercise that special power in favour of the residuary legatee and devisee (*Bury v. Milner*, [1899] 1 Ch. 563).

Para. (7).  
Residuary  
devise and  
bequest.

The testimonium clause concludes the body of the will, and immediately after it the testator should add his signature. The attestation clause shows the ceremonies which should attend the execution of the will, and on this

Execution  
and attesta-  
tion.

**Sect. 3.** account alone it is very desirable to add it to every will, though its presence or absence in no way affects the will's validity. It is, however, also of importance, since it facilitates probate of the will. If it is attached to the will, probate can be obtained on the usual affidavit of the executors ; but if there is no attestation clause, the witnesses must identify the signatures on oath, or if they are dead, the handwriting of the testator and witnesses must be proved (Rule 4, Probate (Non-Contentious) Rules, 1862). See *In the goods of Stephen Sweet*, [1891] P. 400).

It is to be remembered that a person intended to take a benefit under the will, or the husband or wife of such a person, should never be a witness to a will, since by s. 15 of the Wills Act, 1837, the intended gift shall under such circumstances be void.

**Codicil.** A codicil (*codex* : will ; *codicillus* : little will), or, as SWINBURNE calls it, “an unsolemn last will” (Part 1, s. 5, pl. 4), is an addition to a will, and must now be executed in the same way as a will. In so far as it is inconsistent with the will, it revokes it (*Morley v. Rennoldson*, [1895] 1 Ch. 449). Sometimes, however, so far from revoking the will, it makes the will effective. Thus, if the will be improperly executed, the addition of a codicil properly executed will republish and establish the will ; and if a gift in the will be invalid through the legatee being a witness to the will, the addition to the will of a codicil executed before other witnesses will make it good (*Anderson v. Anderson*, L. R. 13 Eq. 381).

**A charitable trust.**

The codicil in our precedent nominally creates what is called a charitable trust. Formerly it was illegal (subject to certain exemptions) to leave by will any land or any money to be laid out in land for the benefit of a charity.

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Now by the Mortmain and Charitable Uses Act, 1891, these devises and bequests are allowed, but the land must be sold within one year from the testator's death (s. 6), and the money must not be laid out in the purchase of land (s. 7). Power is given to the High Court and to the Charity Commissioners to permit the land to be retained, or the money expended on land under certain circumstances (s. 8). What is a charity within this Act is defined by s. 13 (2) of the Mortmain and Charitable Uses Act, 1888, which section is a re-enactment of 43 Eliz. c. 4.

When a gift is for a charitable purpose, a determining condition attached to it is not subject to the rule against perpetuities, provided the object to which the gift is to go on the happening of the condition, is itself also charitable (*Christ's Hospital v. Grainger*, 1 Mac. & G. 460). Advantage can be taken of this for the purpose of endowing for ever an object which is not a charity, by imposing as a condition of the gift an obligation on the trustees of the charity to carry out such object, with a gift over to another charity on their failure to do so. This excellent device has been taken advantage of by Mr. Richard Roe in the trust he creates by his codicil. He wishes to have his tomb and monument kept in perpetual repair. This, however, is not a charitable purpose (*Hoare v. Osborne*, L. R. 1 Eq. 585), and, accordingly, he gives the fund wholly for a true charitable purpose, but directs the trustees on pain of forfeiture of the gift to another true charity, to keep his tomb in repair. This condition is perfectly legal, and so Mr. Richard Roe's tomb is safe against wind and weather (*Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252).

The gift in the codicil is made not to the vicar or incumbent of the parish, but to the churchwardens. The

Gifts of  
personalty to  
parish  
churches.

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— reason of this is that the vicar or incumbent is a corporation sole, and though a corporation sole can hold lands, he cannot hold pure personalty. The churchwardens, on the other hand, are, or are regarded as, a corporation aggregate, and as such can hold pure personalty (1 Bla. Com., p. 477). In them are vested all the goods of the church, just as all the freehold of the church is vested in the vicar.

PART VI.

**ASSURANCE BY REGISTRATION OF TITLE.**





## REGISTRATION OF LAND.

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It has for many years past been the aim of successive Lord Chancellors to facilitate by a system of registration the transfer of land and to make it as readily and as cheaply dealt with as stocks and shares. The first Land Transfer Act was passed in 1862, but its working proved so cumbersome and expensive that only very few took advantage of it, and some of those who did afterwards removed their property from the register. A second Act, passed in 1875, was somewhat more simple, but still open to the same objections. In 1897 the Act of 1875 was amended and extended with one important provision which had been lacking in the previous Acts—namely, that from and after January 1st, 1898 (the date fixed for the commencement of the Act), registration of title was made compulsory. A saving clause was inserted to the effect that only one county should be affected in the first instance by the Act, and the county of London was by a subsequent Order in Council chosen for the first trial of the scheme. But even this county was only to be touched by divisions at dates extending over two years. These dates have been from time to time postponed, so that at the present moment a part of the county (*i.e.*, that south of the Thames and the city of London) is still unaffected. It was also provided that no further order should be made affecting any other county for three years from the making

of the first order unless any county should ask for registration of title to be compulsorily applied. It should be noted that the Act applies to England only.

**Compulsory registration.**

The first registration of land is to be effected when dealt with by way of sale on or after the date fixed for the commencement of the Act, and no conveyance after that date will give the purchaser the legal estate until he is registered as proprietor. With the vendor's consent a purchaser can be entered on the register on production of the contract, but it would appear to be more desirable to defer registration until the conveyance is taken.

By the rules made under the Act the term "conveyance" has been extended to assignments of leaseholds on sale and the grant of a lease or underlease having at least forty years to run, or for two or more lives. Copyholds are not affected by the Act.

**Titles which may be registered.  
(1) Possessory title.**

Land may be registered either with (a) a possessory title ; (b) an absolute title ; or (c) a qualified title. The first mode of registration is the least expensive, and is the one at present most generally selected. For this purpose nothing more is necessary than for the applicant to take into the registry an application upon the prescribed form with his own conveyance and a copy thereof for filing. If upon this deed there is no plan, then the property must be identified on the ordnance map. No investigation of title is made by the registrar, but the conveyance and other title deeds are marked with the fact of their registration so as to give notice thereof to parties subsequently dealing therewith.

Registration with a possessory title only does not affect or prejudice any estate right or interest adverse to or in derogation of the title of the first registered proprietor, whether such estate right or interest appears on the register or not.

The effect of registration with a possessory title is really nothing more than its entry upon the register ; so that a subsequent purchaser or mortgagee takes only the grantor's rights, and will thus still have to investigate the title for the statutory number of years, subject, of course, to the terms of any contract which may have been entered into between the parties. But lapse of time may convert a possessory title into an absolute title.

If the second course be adopted—*i.e.*, of registration with an absolute title—the case is altogether different. (2) Absolute title.  
With the application (which has to be made upon the appropriate form) must be delivered an abstract of title with all the deeds in the applicant's possession, including any opinions of counsel, requisitions on title and replies, and a list of tenants and occupiers. The title is then examined by the registrar, who may refer it to one of the conveyancing counsel of the court. An advertisement of the application has to be inserted once at least in the "London Gazette" and in such local newspapers and for such number of times as shall be fixed by the registrar, requiring objections, if any, to be sent in at the expiration of a period which is not to be less than two months from the period of the last advertisement. Notices must be served upon the tenants and occupiers and any other persons whom the registrar shall deem necessary, and any objections which may be received will have to be disposed of before the title is entered as absolute. For dealing with these objections an appointment is made by the registrar, and at the hearing any party may appear by counsel. Until they have all been satisfactorily disposed of the title cannot be registered as absolute. Assuming this to have been done, then at the expiration of the notices and after the filing of a statutory declaration by the applicant and his solicitor (if so required by the registrar) that all facts material to the title have been disclosed in the investigation, and the bringing in of all deeds and documents and notice of registration thereon being marked, the

registration will be completed and the land certificate prepared and delivered to the proprietor. This vests in the proprietor an absolute title subject to any specified incumbrances and to any unregistered estates or rights (such as a *cestui que trust* may possess where the trustee is registered proprietor), but on a transfer for valuable consideration the purchaser will take free from such unregistered rights and equities, and such purchaser will not be entitled to call for any evidence of title beyond that afforded by a inspection of the register.

(3) Qualified title.

A qualified title cannot be applied for in the first instance, but if where application is made for registration with an absolute title it shall appear to the registrar upon an examination thereof that it can only be established subject to certain reservations, the title can be registered qualified accordingly.

This is the only title which can be registered in respect of leasehold land held under a lease containing a prohibition against assigning without license.

An absolute title cannot be registered in respect of leasehold land except where the freehold title has also been registered with an absolute title.

The register.

The register is to consist of three portions, called respectively,

- (1) The property register ;
- (2) The proprietorship register ;
- (3) The charges register.

The property register contains the description of the land comprised in the title with a reference to the filed plan and notes as to severed mines and minerals, easements, restrictive covenants, etc. The proprietorship register states whether the title is absolute, qualified, or

possessory, and contains the name, address, and description of the proprietor of the land, and particulars of any cautions, inhibitions, and restrictions affecting the same. The charges register contains incumbrances and other rights affecting the land, and all dealings with registered charges and incumbrances. Portions Nos. 1 and 2 will generally be bound up together, but the charges register may, if the registrar thinks fit, be kept separate, and no portion of the register will be open to the inspection of anyone save the registered proprietor or his authorised agent.

Land registered under the Transfer Acts will cease to be subject to the provisions of any local Registry Act.

Settled land may, at the option of the tenant for life, be registered either in his name, or, where there are trustees with power of sale, in the names of those trustees ; and there must also be entered on the register such restrictions or inhibitions as may be necessary for the protection of the rights of the persons beneficially interested in the land. These persons are defined by the Rules to be those only who would be necessary parties to a sale or mortgage thereof if the land had been unregistered ; but it is incumbent on the trustees, or if there are no trustees, on the registrar, to give notice of such restrictions and inhibitions to such of the beneficiaries as the registrar shall direct. These restrictions and inhibitions take the form on the register of an Order, *e.g.*, where the tenant for life is registered as proprietor, “ No sale of house and land shown on plan to be made without the consent of [the trustees] or of the court,” or where the trustees are registered as proprietors, “ until further order no transfer or charge to be made without the consent of the tenant for life.”

Registration  
of settled  
land.

On the death of a tenant for life who has been registered as a proprietor, the settlement trustees are to apply for the registration of his successor.

The registered proprietor of settled land must on the request and at the expense of any person entitled to an estate interest or charge conveyed or created for securing money actually raised at the date of such request, charge the land in a prescribed manner with the payment of the money so raised.

‘Cautions.’

The Act provides that any person interested in any land not for the time being registered may lodge a caution with the registrar in a prescribed form to the effect that the cautioner is entitled to notice of any application being made. Such caution must be supported by affidavit setting out the nature of the cautioner’s interest, and the land to be affected thereby, and this will entitle him, whenever an application is made, to notice thereof, when he can attend and appear and oppose. This is the only effect of lodging a caution.

Land  
certificate.

Upon the registration of land, with whatever title, a land certificate, with entries corresponding to those on the register, is handed to the registered proprietor, and he can then deal therewith, either by deposit or charge subject to any registered rights affecting the same. The land once upon the register, transfers must be made upon the forms prescribed by the Act and Rules. These forms are very concise, and may maintain to a large extent the phraseology of the Conveyancing Acts. All transfers must of course be taken in for registration, and will only confer the same title—*i.e.*, possessory, absolute, or qualified—as that possessed by the registered proprietor.

If a transfer be made by a registered proprietor of part only of the land registered in his name, this will open a new entry in the register for the part so transferred.

Registered  
charges.

Charges must also be effected by instruments in the form required by the Act, and must be registered, as well as leases, foreclosures, and other dealings. The statutory form of charge is a simple charge of the land affected



with the payment to the lender of a certain sum of money. The estate is not conveyed, but there is implied in the charge covenants to pay principal and interest, and in the case of leaseholds, to pay the rent and observe the covenants of the lease and indemnify the charge therefrom. There is also implied the power of sale, appointment of receiver, and insurance given by ss. 19, 20, and 21 (except sub-ss. (1) and (4)), 22, 23, and 24 of the Conveyancing and Law of Property Act, 1881, and of foreclosure over the whole estate of the registered proprietor in the land affected, in the same manner as if the chargee were himself the registered proprietor.

Subject to any entry in the register to the contrary, charges on the same land will, as between themselves, rank in the order in which they are entered on the register, and not according to the order in which they are created.

Any person interested under any unregistered instrument, or as a judgment creditor in any registered land, may lodge a caution with the registrar requiring no dealing with such land or charge without notice to the cautioner. Any such caution must be supported by an affidavit, giving full particulars of the interest of the cautioner. This is the only mode of protecting unregistered dealings with registered land. Unregistered charges.

A question of some nicety arises as to the effect of a charge on leasehold land, in view of the fact that it is the custom to take mortgages of leaseholds by sub-demise, and thus prevent any possibility of the mortgagee becoming liable for the lease covenants. The general opinion seems to be that the charge will not vest the legal estate in the mortgagee, but that the most prudent course in the case of leasehold mortgages is to take not only the statutory charge, but also an unregistered mortgage by demise in the usual form obtaining entry of notice thereof on the register. A further question arises whether, if the legal Charges on leaseholds.



estate under the charge does not pass to the chargee, he would be entitled to maintain an action of ejectment against an occupier or tenant.

Death of  
registered  
proprietor.

Upon the death of a registered proprietor, the probate of his will or letters of administration must be taken into the registry, and the executors or administrators will be registered in place of the deceased, with the addition of the word “executor” or “administrator” of the deceased; and there must also be subsequently registered any “assent or appropriation” in case the land has been devised or passes to the heir-at-law.

It is, of course, impossible, within the limits of a brief treatise such as the present, to enter fully into the many questions of construction which may arise under the Act. All that has been attempted is to give a *resumé* of its leading provisions.

Observations  
on the Acts.

Time has yet to prove whether the operation of the Act will be beneficial or otherwise. In the case of simple dealings it appears probable that after registration has once been effected, especially in the case of titles absolute, the cost of such dealings may be diminished; but having regard to the varied and manifold interests and estates which affect real property, and all of which will have to be notified in some shape or other upon the register, it seems very doubtful whether a prudent purchaser or mortgagee will not insist upon the title being examined by a professional adviser before parting with his money, in the same way as has hitherto been done; so that there may not be any material saving either in time or expense. But until experience has proved the benefit or otherwise of the change, it would be rash to prophesy what the result will be. The Act is, at any rate, well intentioned for the benefit of future generations.

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